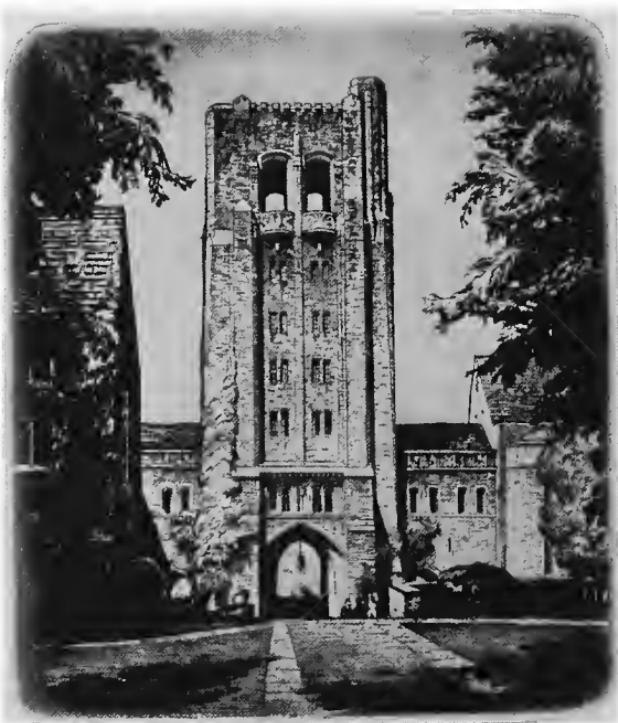


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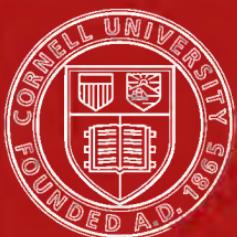
Bar examinations (New York) and courses



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# BAR EXAMINATIONS

(NEW YORK)

AND

## COURSES OF LAW STUDY

CONTAINING THE

STATUTES AND RULES OF COURT REGULATING ADMISSION  
TO THE BAR IN NEW YORK STATE AND FORMS  
AND INSTRUCTIONS FOR THE BAR EXAMINATIONS  
AND SOME OF THE QUESTIONS, WITH THE  
ANSWERS THERETO, HERETOFORE USED BY  
THE NEW YORK STATE BOARD OF LAW  
EXAMINERS; ALSO COURSES OF LAW  
STUDY SUITABLE FOR THE USE  
OF CLERKS IN LAW OFFICES.

---

FRANKLIN M. DANAHER, AND B. DAMD  
*Member of the New York State Board of Law Examiners.*

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*SECOND EDITION*

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ALBANY  
J. B. LYON COMPANY, PRINTERS  
1905

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ALBANY, N. Y.



TO

HON. WILLIAM P. GOODELLE

AND

FRANK SULLIVAN SMITH, Esq.,

MEMBERS OF THE NEW YORK STATE BOARD OF LAW EXAMINERS

*In recognition of their time and labor given out of a  
busy professional life in successful aid of  
higher education at the bar.*



## NOTICE TO SECOND EDITION.

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We believe that our book has been of benefit to those who followed the methods for its use set forth in the introduction to the first edition.

We determined at one time to annotate, for this edition, the first 300 answers, but finally concluded not to, because our labor in that direction would but lighten the task of the student to his detriment. We would be doing the "digging," no other word will so aptly describe the process, that he should do, and as hard and persistent work along the line of investigation will alone produce results, we expect him to do all the "following up" of the cases cited that may be necessary to the thorough understanding of the problems set forth.

We have added 100 additional questions and answers which we trust will be of assistance to some seekers after knowledge in the law.

ALBANY, N. Y., November, 1905.

F. M. D.



## **BAR EXAMINATIONS.**

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### **PREPARATION FOR BAR EXAMINATIONS.**

Whatever may be the popular opinion concerning examinations in general as a test for any purpose, or as a condition of admission to a profession or occupation, or what may be the opinion in particular of applicants for admission to the Bar on the same subject, the fact is patent, that as to the latter a condition and not a theory confronts them in that regard, and that sooner or later they must pass the ordeal of an examination as to their knowledge and capacity in the law, as a condition precedent to their admission to the practice thereof, and their entrance upon their life work. So, it may be said, that all their labor, during many years of preparation, is directed toward that absolute certainty, which they approach with varying feelings of fear or confidence, depending much upon temperament, a knowledge of deficiencies, or upon that courage which comes from thorough preparation, the result of industry and method in their preparatory study.

If we were asked what in our opinion produced the best results in law study, we should thrice repeat, as did the ancient Athenian, who said that "action, action, action," was the key to success in oratory, that method, method, method is the only possible way of digging below the surface of the world of law to unearth its treasures, or to make the slightest impression upon its ever-growing mass; a ceaseless and progressive growth that is rapidly carrying dismay and despair to the hearts of those who realize its stupendous and unconquerable results. By method we mean scientific direction in what and how and when to study, a direction which cannot be obtained, however, outside of the walls of a properly constituted School of Law. To those, therefore, who are struggling to obtain some knowledge of the law while

serving a clerkship in a law office we say, do not stand a moment on the order of your going, but matriculate at once in some law college; the advantages which you will gain thereby will repay you many fold for your possible sacrifices in so doing.

We have written and said much upon the necessity of law-school training as a preparation for the Bar under modern conditions existing in law offices, and concerning the absolute waste of valuable time and endeavor to obtain the required qualifications while serving a law clerkship therein, we will say nothing further on the subject herein.

To those who cannot, by reason of their environment, attend upon a law school we recommend a careful following of the "Courses of Law Study," quasi law college curriculums prepared at the request of the New York State Board of Law Examiners, for their benefit, and the good of the profession, by learned professors in the science, which are printed herewith.

Bar examiners are not educators and handle only the supposed-to-be-finished product of the schools and offices; neither are they, as a rule, competent to lay out courses of study for aspiring applicants for admission, and we make no pretense in that regard. It is their duty to test the capacity of those who come before them for certificates as to their competency in the law; and the good they accomplish to the State, to the profession, and to the possible clients, in having a fair yet sufficient standard, is the justification of their existence as such, and to some extent their only reward. Yet, if an applicant studies only for the purpose of passing his bar examinations and is content with that meagre satisfaction, and does not look over and beyond that slight stumbling block in his path, to the honors and compensations of his chosen profession, he is indeed short sighted and fails in his duty to himself, to his profession and to his future clients and enters upon the same but poorly fitted for its responsibilities and great labors. He will not benefit to the limit of its possibilities and will be ever but a hewer of wood and a drawer of water therein, many of whom are in the profession to-day to its disadvantage. Competition is keen

in the practice of the law, and more so at the bottom of the ladder, down in the depths among the weak, than it is on the top, among the strong, and where each will be depends entirely upon himself.

To keep abreast with the necessary learning in the law is a labor as constant and as wearying as that of Sisyphus. In its study there is no such thing as rest; he who does not advance therein each day, of necessity, recedes. It is as unstable as the restless sea, and constantly developing to meet the ever-changing necessities of our growing civilization. Courts and Legislatures, including those of the United States, are ever making and unmaking law, and amending, abridging, distinguishing, differentiating and limiting the same, so that to-day he who can master thoroughly any one of its great subdivisions, has accomplished that which but few have done. The future of the practice must be one of specialization; and as difficult as it may be in the beginning to obtain recognition therein, a student should select a specific branch of the law and make himself proficient therein beyond the average of his fellow practitioners. His special learning will sooner or later be recognized. But he should not neglect the primary essentials of constant, intelligent and methodical study and untiring industry in the broad fields of general law, otherwise he will reap neither professional nor pecuniary rewards in his chosen sphere of legal activity.

The practice of the law as a means of livelihood, has been revolutionized within the past decade, and the economic changes of the century past have not left it unscathed. Trusts which have imperially benefited the few, by reason of their many consolidations of possible clients, have undone many in the profession. Corporations now virtually practice law; they draw wills, probate them, and act as executors and trustees, formerly the family lawyer's perogative; they sell property and search and guarantee titles; they incorporate, and, when necessary, will furnish their clients with an office and a ready-made board of directors; they collect bills through the pressure of unincorporated mercantile agencies and the terrorisms of unfavorable financial reports; they advertise to prepare briefs, in fact, what are they not doing

to the financial and professional detriment of the "average" lawyer?

We are not pessimistic; the only way to avoid a danger is to know it, and what we have said above is but to call a halt in the enthusiasm of the average student in law, and to point out a few of the pitfalls which impede his path to the fatuous fame and wealth of the profession, and to make him realize that if his studies thus far have been but for the purpose of passing his bar examinations that he will have much to grieve for in a future of disappointment that surely awaits him, unless he changes his present ideas as to the requisites of learning and character necessary for success in the practice of the law.

#### THE SUBJECTS OF EXAMINATION.

Applicants are examined in the following subjects:

Pleading and Practice, Real Property, Contracts, Partnership, Negotiable Paper, Principal and Agent, Principal and Surety, Insurance, Bailments, Sales, Evidence, Criminal Law, Torts, Wills, Equity, Corporations, Domestic Relations, Constitution of New York State.

Sixty-six and two-thirds per cent. of correctness is required. This percentage is calculated upon the entire paper and not upon the particular subjects, so that strength in some may compensate for weakness in others. All questions are of equal value except those in Practice and Pleading and Constitution, which are rated at but half values, not because they are of less value in fact or should not be studied, but solely because the Law Examiners believe that those subjects will be better understood by the student as he grows older in the practice of the law. Each answer is read and adjudged with all the care that the importance of the objects and purposes of the examinations demand. The good that is in it is weighed and credited, and the errors therein penalized. A correct answer with bad reasoning receives some credit, a wrong answer is without grace.

The test is the applicant's competency to advise clients; and if he advises them wrong, what consolation is it to his un-

fortunate victim, that his lawyer had reasons therefor which he deemed good and sufficient, but which, however, were without merit and bad in law?

#### HOW TO TAKE THE EXAMINATION.

The examination consists of fifty questions, twenty-five in a morning session of four hours, and twenty-five in an afternoon session of the same length. There is an hour intermission between the sessions.

It must be observed that in four hours there are 240 minutes, which gives the applicant an average of about nine minutes in which to answer each question, an important factor to be taken into consideration in the distribution of his time and in the problem of his being able to finish the examination within the time limit, for a question not answered is a question missed beyond hope of redemption.

The test is the applicant's ability to advise clients according to New York Law, so the questions are mainly such as would be put to a lawyer in his office by a client, and consist of concise statements of facts, which may arise in the affairs of life, involving propositions of law, and the applicant is required to state what course of procedure he would follow, or what would be his advice to his clients under the circumstances narrated. In addition, questions of procedure and evidence are submitted in the way they ordinarily arise in the actual trial of cases in court, and he is required to solve them substantially in the same way and as promptly.

It will be seen therefore that the examination is practical and not theoretical, and being based exclusively upon the rulings of the courts and the statutes of the State in which he is applying for admission, his knowledge must be exact and according to New York standards. The laws of our sister States are as foreign to us as are the laws of England, so under the practical requirements of the New York State system of bar examinations it does not stand an applicant in good stead to know what the law of another State or country is on the particular question asked, or what the law used to be or should be, provided he does not know the law as it is.

Answers that are not correct, according to New York Law, are not credited, for it would be but little satisfaction to an unfortunate client who has been damnified by wrong advice, to be consoled by his incompetent legal adviser with the statement that that which he said and his client followed was at least good law in Lord Coke's time, or in Massachusetts now, or should be the rule any way; we do not care to encourage such post-mortem consolation.

The test of knowledge is the living principles of the law as it obtains in New York to-day (we give no guarantees for the future) and that is the law which applicants should study and learn, who intend to practice their profession in this State.

The examination being practical, the State Board of Law Examiners wants the answers to be likewise, and not theoretical. They should be concise and to the point. The experience of the Board gives its members facility in determining the extent of the applicant's knowledge from the character of his answer, and no answer, if correct, can be too short. Ten to fifteen lines is ample for all purposes, beyond that there is danger, especially if there be error, for that grows in geometrical proportion as the answer is heedlessly spun out. *Write your answers first and give your reasons thereafter.* That is a piece of advice of practical importance. It is far easier, admits of better work, and produces better results to endeavor to sustain a given proposition than it does to try to reach a conclusion after a long argument. The first method tends to logical conciseness, the latter to wordy diffuseness, in addition to its being the more laborious and a greater consumer of the applicant's limited time, to say nothing of the patience and good nature of the examiners called upon to read what he has unnecessarily written.

Do not give information that is not asked for. All that is in the examiner's mind and all that you are called upon to consider is what is written in the question before you. It contains every necessary element for a proper and correct answer, and what is not therein stated is not involved, unless, perhaps, it be a legal principle necessarily following from the circumstances narrated. The examiners ask you to

give your knowledge on the precise question put before you. If they want anything else they will ask for it, so perchance if the question be in Bailments, and you are asked what particular feature of that law is involved in the particular question, do not roam at will over the entire range of the subject, and tell, with much display of pseudo learning, all you think you know about Bailments in general, and their variations and fine differences in particular. You are not asked, nor required nor expected to do so. You are liable by so doing, to lose sight of the point in the question and thus fail to answer it, or when you come to it, you may not have time to do it justice. In addition, if you go wrong, the more you write the greater will be your offense, and you may be justly penalized for incorrect answers that you were not asked to give.

Read the questions carefully, and endeavor to understand what is involved therein. The language used is your only guide; it has been carefully considered and the words are used in their technical sense. Find first the principle of law to which it relates, whether to Contracts, Bailments, or other subject, and then apply the facts thereto, and write your answer. There are no "catch" questions, they mean what they say, so do not dig beneath the surface for some occult meaning, if you do, you are apt to go astray.

Do not answer in the alternative unless asked to do so, nor "straddle." Answer the questions squarely as you understand them and do not endeavor to evade their requirements. The examiners have sufficient experience to know from the answers given whether the applicant knows what he is writing about or not, and it is useless to try to deceive them by shifty, noncommittal, or evasive answers.

#### THE QUESTIONS.

A book of "Questions and Answers" or "Quiz Book" so called, can be of educational value, if properly used, otherwise, it is a delusion, a snare, and a detriment, and this book is no exception to the rule. If it be purchased by those seeking to be admitted to the Bar, without possessing the neces-

sary qualifications to be a credit either to themselves or to the profession, as a "cram," or in the hope that in the near future, the questions heretofore asked by the examiners and herein printed will be repeated, they will be sadly disappointed, for if these questions or their variants are used again, it will be through inadvertence, and not for want of time or disposition to invent new problems for the benefit of those who apply hereafter.

Books of "Questions and Answers" are not to be encouraged, and it was with great misgivings that the Board allowed us to publish this one, but it was felt that as such books would be and are used quite extensively, and that as many of its questions, full of error, had been surreptitiously published that this book, if its use in a proper way could be directed, might be of some educational value, and it is issued from that point of view only.

We give six complete question papers, or three hundred of the questions heretofore used by the State Board of Law Examiners, and the answers thereto, as the writer understands them, and he is alone responsible for their correctness.

Three hundred questions may not be many, but they are sufficient for the purposes for which this book was issued. It is not a *Vade Mecum*, neither is it an Encyclopedia, nor intended to be a substitute for any law book or other course of study. The questions are published to give to the student a fair, general idea of the quality of the questions used by the State Board of Law Examiners and to afford him an opportunity of practically testing his knowledge of the law thereby, and to direct his attention to his deficiencies and to new channels of research. If he will study, digest, and correctly answer the three hundred questions given, he will be able to read his title clear to pass any fair and practical examination in law that any Board of Law Examiners, no matter how constituted, can place before him.

We have made our answers concise and have cited but one or two cases in support of each, for the reason that it is not within our intention to write an essay nor to attempt to exhaust the law on the various questions propounded. We have selected an authority which upholds each answer given,

merely as a starting point for that further and independent investigation by the student, which we deem essential to the proper use of the book and to get value therefrom.

We desired also to suggest the length of an answer sufficient to satisfy the examiners, if otherwise correct.

This book should be used as would an arithmetic or an algebra. The student must not imagine that he can memorize the questions and the answers thereto and retain them correctly. The technicalities and refinements of the law will not permit it. The questions demand construction, such as statutes require, and it is physically and mentally impossible to correctly preserve the meaning and legal relation of the words for use upon a future examination. Such a method of study is not only unwise, but is also beyond power. The loss of a single word, or the substitution of another, or its displacement in a sentence may entirely change the legal meaning and effect of the question, and require a different answer than the one memorized. The student will use his memory to recall words and not principles, and error will invariably result therefrom. No person would endeavor to learn a problem in higher mathematics by memorizing the figures nor without working out the processes, yet some students imagine they can learn law from a book of "Questions and Answers" by following similar methods.

Our advice is to treat each question as one would a problem in mathematics, and solve it in writing. Read a question and write on it as you would be compelled to do at an examination for ten minutes, including the time taken to comprehend it, and then compare what has been written with the answer given. That will give the student some idea of his proficiency. But do not stop at that; the subject having been opened up, it should be pursued to a finish. Use the citation given as a starting point for an investigation of the entire subject. Follow it through all its subsequent career; find where it has been cited, and read those cases; read the other cases cited in the opinions, no matter how far they may go back; hunt for the principle in encyclopedias and textbooks, and brief what you find. If one desires to understand a statute, or an opinion, and to retain it in memory, he must

digest it in writing. The labor of the process itself will help to impress the learning of the principle upon recollection as no mere reading of it can possibly do. Make a written brief on as many of the given questions as possible; the applicant will then obtain benefits in the only way they can be had from any book of "Questions and Answers," no matter by whom compiled or written.

#### PRACTICE ON ADMISSION.

Each applicant who has been examined is notified of the result thereof in about two weeks after the examination has been held, by written notice directed to his home address as the same is sworn to in his application papers.

One who fails is so informed; he is entitled to a re-examination, provided he notifies the Secretary of the State Board of Law Examiners, in writing, of his desire therefor, at least fifteen days before the examination at which he intends to reapply. He cannot, however, be re-examined until after the expiration of three months from the time that he failed.

To the applicant who has been successful, a certificate signed by the members of the State Board of Law Examiners is mailed, certifying his name to the Appellate Division, in which he has resided for the six months immediately preceding his examination as the same appears in his application papers. The certificate is to the effect that the applicant has satisfactorily passed the examination prescribed by the Rules of the Court of Appeals, regulating admission to the Bar in this State, and has complied with their provisions.

The applicant is required to produce and file with the Clerk of the Appellate Division to which he is certified (none other has jurisdiction) the above certificate of the State Board of Law Examiners, and a certificate of good moral character, signed by the attorney with whom he has passed his clerkship, or by some attorney of the place in which he resides. Such certificates as to character are not conclusive and the Court may make further examination and inquiry in regard thereto.

On the above certificates the candidate is admitted to the bar, provided he subscribes the roll of attorneys and takes the constitutional oath of office. He is also further required as a condition precedent to his practicing law in this State, to register in the office of the Clerk of the Court of Appeals, as required by chapter 165 of the Laws of 1898, as amended by chapter 225 of the Laws of 1899. (For Form of Oath, *vide* p. 228.)

The procedure on admission in the various departments varies somewhat. The special practice in each department, as it now obtains, is as follows:

#### FIRST DEPARTMENT.

In this department the Appellate Division appoints annually a Committee on Character to which is referred by the court all applications for admission to the Bar, and which is required to report to the Court, specifically as to the good moral character of each applicant.

This Committee after each examination gives notice in the New York Law Journal, of its meeting in substantially the following form:

Appellate Division of the Supreme Court First Department.

COURT HOUSE, MADISON SQUARE.

The Committee on Character for the year 19.., will meet in the above court house on..... at .... 19 . All applicants for admission to practice as attorneys and counselors *must attend in person* before the Committee and present a certificate of one or more members of the Bar known to the Committee, which certificate must state that the applicant is, to the knowledge of the members certifying, of good moral character, and must set forth in detail the facts upon which such knowledge is based.

The Committee call special attention to the requirement that there shall be a certificate from a lawyer known to some member of the Committee. It is important that this certificate shall state facts and the acquaintance with the

applicant which justifies the opinion expressed as to character.

Dated, New York, .....

.....,

.....,

.....,

Committee.

It is usual to notify the applicant then and there if his evidences are sufficient. Notice is also given at that time of the day on which the successful ones will be sworn in, at which time and place they appear in person before the Appellate Division, and take and subscribe the required oath of office.

#### SECOND DEPARTMENT.

In this department the Appellate Division has adopted the following special rule:

##### Rule Relating to the Admission of Attorneys in the Second Department.

"Notice of the time of application for admission as attorneys by those who have passed the examination prescribed by the Rules of the Court of Appeals, will be published in The Law Journal, at which time applicants must file with the Clerk the papers enumerated in Rule I of the General Rules of Practice, and appear personally before the Committee on Character to furnish such information as the Committee may desire from them."

Notice of the time of application for admission as attorneys is published in the "Law Journal" and mailed to each applicant by the Clerk of the Appellate Division, at which time each must file with the Clerk of the Appellate Division the certificate of the State Board of Law Examiners and evidence of good moral character, and also appear in person before the Committee to furnish such information as the Committee may desire from them.

The notice is substantially in the form following:

**Court Notice.****SUPREME COURT — APPELLATE DIVISION.****SECOND JUDICIAL DEPARTMENT.**

The Committee on Character for the year 190.. will meet in the court room of the Appellate Division, Borough Hall, Brooklyn, . . . . . at 9 A. M.

All applicants for admission to practice as attorneys and counselors must attend in person before the Committee and present certificates, duly acknowledged, of one or more members of the Bar, personally and well known to the Committee, which certificates must state that the applicant is, to the knowledge of the members certifying, of good moral character, and must set forth in detail the facts upon which such knowledge is based.

The Committee call special attention to the requirement that there shall be a certificate from a lawyer known to some member of the Committee. It is important that this certificate shall state facts and the acquaintance with the applicant which justifies the opinion expressed as to character.

Dated, Kings County, N. Y., . . . . . 190...

.....,

.....,

.....,

Committee.

'After the Committee on Character has examined each applicant, it reports the names of those whom it recommends to the Court for admission, who are notified by the Clerk of the time and place of their being sworn in, where they must attend in person.

**THIRD DEPARTMENT.**

In this department the Court does not appoint a Committee on Character ; the judges personally examine and pass on the certificates of good moral character filed by the applicants, which should be in the form prescribed by the rules in the First and Second Departments, but neither verified nor acknowledged.

An applicant for admission should file his certificate from

the State Board of Law Examiners and of good moral character with the Clerk of the Court on or before the first day of the term, and appear in Court in person on that day. If his certificates are approved, he is at once admitted and sworn in.

FOURTH DEPARTMENT.

The Clerk of the Court mails to each successful applicant a notice of which the following is a copy:

CLERK'S OFFICE,  
APPELLATE DIVISION  
OF THE  
SUPREME COURT,  
FOURTH DEPARTMENT.

ROCHESTER, . . . . . , 190...

DEAR SIR.— Your name has been reported favorably by the Board of Law Examiners. You will please send to this office IMMEDIATELY, the certificate of said Board and TWO AFFIDAVITS as to good moral character. Please place the certificate of Board on the OUTSIDE properly backed.

You may appear on the . . . . . day of . . . . . at 2 o'clock, to be sworn in.

Please acknowledge receipt of this notice.

.....  
Clerk.

The Court appoints no Committee on Character, the judges personally make the necessary investigation into the moral character of the applicants.

All appear, unless notified to the contrary, on the day named in the notice and are sworn in.

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We are indebted to Ellis J. Staley, Esq., of the Albany County Bar for much valuable assistance in the preparation of this book.

Albany, March, 1904.

FRANKLIN M. DANAHER.

# **QUESTIONS**

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**STATE BOARD OF LAW EXAMINERS**

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**EXAMINATION OF APPLICANTS**

**FOR**

**ADMISSION TO PRACTICE AS ATTORNEYS AND COUNSELLORS-AT-LAW**

**HELD IN AND FOR THE**

**THIRD AND FOURTH JUDICIAL DEPARTMENTS**

**OF THE**

**STATE OF NEW YORK**

**AT**

**Albany and Rochester, January 16, 1902**

---

**WILLIAM P. GOODELLE  
FRANK SULLIVAN SMITH  
FRANKLIN M. DANAHER**

*State Board of Law Examiners*



## **EXAMINATION RULES.**

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1. Each applicant must commence his answer paper with answers to the following questions:

- (a) What is your name, age, residence and post-office address?
- (b) Where and with whom have you pursued your legal studies?
- (c) What educational advantages did you have before beginning the study of law?

2. Write answers in the order of the questions. Do not copy the questions, but write the number of each question on the margin of the paper, and under its proper subdivision. *Write only on one side of the paper.* Write your name and the number of the page on each separate page of your paper.

3. The written examination will be held in two sessions of four hours each; no further time will be given. Each applicant must return the examination papers with his answers thereto. Unless this is done the Board will not pass on his application. No applicant shall enter the examination more than half an hour late, and no applicant shall leave the room within half an hour after the distribution of the examination papers, nor in any case until he shall have returned the same to the Board.

4. **GIVE YOUR REASONS FOR EACH ANSWER.** Answer the questions first, then give your reasons. Do not give information that is not asked for.

THIRD AND FOURTH JUDICIAL DEPARTMENTS.

Albany and Rochester, January 16, 1902.

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EXAMINATION PAPER.

Forenoon — Four Hours.

---

1.

1. Draw complaint, without verification, for an action for assault and battery in the County Court, demanding the full amount of damages recoverable in that Court.

2.

2. A brought an action against B for trespass, claiming that B entered upon his premises and polluted a well of water. B answered by a general denial, and also set up affirmatively that the title to the premises was in C. On the trial A proved his possession, the trespass, and his damages; and rested, proving no title in himself. B offered no evidence except he established title in C and rested. Evidence closed. Judgment for whom and why?

3.

3. Plaintiff's complaint, in an action at law, alleged two independent causes of action which were separately stated. The defendant by answer joined issue upon the facts alleged in both causes of action. On the trial the Court upon the whole evidence directed a verdict for the defendant, both on the law and facts, on the first count. On the second count, the jury found a verdict for the plaintiff of over \$50. Who is entitled to costs and why?

4.

4. A brought an action against B and C jointly for assault and battery. The complaint stated a cause of action against

both, and the proof, on the trial, sustained the allegations of the complaint. Both B and C appeared and defended the action. The jury found a verdict for " \$1,000 for plaintiff," but the prayer for relief, through inadvertence, demanded judgment only against B, who was irresponsible. C was responsible. Against whom could A lawfully have entered judgment and why?

**5.**

5. Enumerate concisely, in chronological order, (doing nothing more) the necessary steps to foreclose a real estate mortgage by action, where none of the defendants has appeared.

**6.**

6. The law has taken hold of B and he is serving a term in State's prison. You desire his testimony on the trial of an important case. How will you obtain it?

**7.**

7. A conveyed by warranty deed to B ten acres of land surrounded on three sides by A's remaining land and on the other side by land of C. B had no way of getting to or from his purchase of ten acres, except to cross A's or C's land. B claimed an easement *by necessity* to a right of way to and from his ten acres across A's land, to which A reluctantly consented. B, after using the same for thirty years, bought C's land: thereupon A fenced B's way across his premises and forbade him longer using it. Litigation is threatened. What are the rights and obligations of A and B in the contention? State your reasons.

**8.**

8. July 15th, A sold and conveyed by deed his farm of five hundred acres to B without reservation. There were fifty acres of meadow, twenty of which had been cut and the hay was being cured on the ground from which it was cut. Fifty cords of wood that had been cut from the woodland were corded in the woods. One thousand cedar posts were piled on the premises, and five hundred more were distributed along the fences to replace those which had become decayed or broken therein. A dispute arises between A and B as to

whom the specified property belongs. Each claims to own all. What do you say?

9.

9. A and B were the owners of real estate as tenants in common. B conveyed his interest to C, wife of A. A and C at once entered upon and occupied the entire premises together, and had a child born unto them. A died intestate, leaving C, his widow, and the child, him surviving. What are the respective interests of C and the child in and to the *entire* property formerly owned by A and B?

10.

10. On January 2, 1894, A became indebted to B for rent on a lease, not under seal, in the sum of \$500. No payments of either principal or interest were thereafter made thereon. In June, 1901, B presented the lease to A in the presence of two witnesses and demanded payment of the amount due thereon. A said to B, "I acknowledge that lease and that there is \$500 and interest honestly due thereon, which I promise to pay to you in three months." He has not done so, and B consults you. What would be your advice under the circumstances?

11.

11. A entered into the employ of B as an expert accountant under an agreement to remain for one year at the annual salary of \$2,400, payable monthly. After working for six months, A was offered employment by C at the rate of \$4,000 a year. He stated the facts to B and notified him of his intention to quit at once, unless B paid him at the same rate. B said, "I cannot afford to let you go and under the circumstances I will pay you the additional compensation at the end of your term if you will remain with me." A said, "He would." At the expiration of A's term, B discharged him and also refused to pay him the additional compensation as he had agreed to, as above. A now consults you. What would be your advice?

12.

12. A and B formed a limited partnership under the statute. A was the special partner. Each contributed to the

capital of the new firm \$40,000 in cash. The business did not prosper and thereafter the firm failed, owing \$100,000 to firm creditors, over and above all assets. State the respective liabilities of A and B under the circumstances disclosed.

**13.**

13. A and B were copartners in trade. A died. What are the respective rights of A's representatives and B under the circumstances?

**14.**

14. On January 10, 1900, Richard Roe, for value, duly executed and delivered to John Doe, a paper in the form following:

ALBANY, N. Y., *January 10, 1900.*

For value received I promise to pay to the order of John Doe \$1,000 on his twenty-first birthday, with interest.

(Signed)

RICHARD ROE.

John Doe indorsed the instrument and transferred it for value to A, who failed and neglected to present it for payment on January 15, 1902, when Doe became 21 years old. A subsequently brought an action thereon and Doe pleaded as a sole defense A's neglect to present the same for payment; its non-protest and failure to give him notice. On the above facts judgment for whom, and why?

**15.**

15. A made his certain negotiable promissory note in writing, by which he promised to pay to the order of B the sum of \$1,000 three months after date for value received. B, in fraud of A, altered the note and made it read \$2,000, and in that form it came into the hands of C, a holder in due course, not a party to the alteration. The note not having been paid at maturity, C sued A thereon. The above facts appearing on the trial, what should the judgment be and why?

**16.**

16. B, a married woman, is the owner of certain houses in the city of New York. Her husband came to X, a carpenter,

and stated that his wife wanted some repairs made therein of the value of \$500, which the carpenter made. He presented his bill therefor to the wife who refused to pay, stating that she never authorized her husband to order the same. X consults you and claims that the husband had, by virtue of the marital relation, the right to act for the wife in the transaction, and as her property was increased in value by the repairs, the benefits of which she was reaping, she should certainly pay. What would be your advice?

17.

The carpenter did not know who was the owner of the property. He did the work in a proper manner, as requested, and charged it to X, the agent, individually. X refused to pay. The carpenter consults you as to the agent's liability. What would be your advice?

18.

18. A was surety and B principal in a bond, conditioned that C would pay \$5,000 in cash to B on January 1, 1901. On January 1, 1901, C was unable to pay and asked B for three months' additional time. B replied, "All right; take it." At the expiration of the three months C did not pay and B sued A on the bond. A knew nothing concerning the transaction, and now claims that the facts disclosed discharged him from his obligation. What do you say, and for what reason?

19.

19. A entered into a contract in writing with B, whereby A was to receive from B and manufacture into cloth a certain quantity of wool, the cloth to be delivered at B's warehouse

in Boston. The performance of the contract was duly guaranteed by C. Subsequently, after the delivery of the wool by B, but before the cloth was manufactured, B sold the cloth to D, in New York city, subject to delivery by A to D, at D's store in New York. A assented to this arrangement, nothing being said to C about it. A failed to perform his contract to manufacture and deliver the cloth. B sues C on his guaranty. Can B recover? If so, why? If not, why not?

20.

20. A has a judgment against B, which is a lien on a building which is B's only property, and obtains upon the building for his benefit a policy of insurance in X company. The building burns. The insurance company refuses to pay the loss and A brings suit against it. Can he recover? State the principle involved.

21.

21. A was employed by B as a clerk, and being unable to obtain the wages due him he took out an insurance policy upon the life of B for the amount of his claim. He then left B's employ. Ten years thereafter B died, without having made any payment upon the amount due A. The insurance company refused to pay. A brings suit upon the policy. Can he recover? State your reasons.

22.

22. An Art Association obtained the loan of a valuable painting for the purposes of an Art Exhibition, and entered into an agreement in writing with the owner "to return the said work of art to the owner at the end of the Exhibition in as good condition as when loaned." The Association was to pay the owner of the picture nothing for its use. The painting was placed on exhibition with other pictures in a gallery to which the public was admitted upon the payment of an admission fee. A visitor, afterward declared to be insane, struck the painting with a chair, thereby doing it great damage. The injury to the picture did not occur through any fault or negligence of the Art Association. Is the owner

**24 BAR EXAMINATIONS AND COURSES OF STUDY.**

entitled to recover from the Art Association the amount of damage sustained? Give your reasons.

**23.**

23. A farmer entered into a contract with a miller under which the miller was to grind at his mill a certain quantity of corn and oats, owned by the farmer, mix them in certain proportions and sell the mixture as horse feed. The proceeds of sales were to be divided between the two, ninety per cent. to go to the farmer and ten per cent. to the miller. A creditor of the miller obtains an attachment upon the mill and its contents including the horse feed above mentioned, which had been manufactured but not sold. What are the rights of the respective parties with reference to the feed? State your reasons.

**24.**

24. A bought goods from B, who warranted the same to be of a certain quality. The price paid was twenty-five per cent. below the real value of such goods corresponding to such warranty. Upon delivery of the goods to A, it was discovered that the goods were inferior in quality. A retained the goods and brought an action against B upon the warranty. Can A maintain his action, and if so, what is the measure of damages?

**25.**

25. A farmer sold a flock of sheep which he knew to have an infectious disease known as "seab." He represented to the vendee that the sheep were healthy. The vendee believed and relied upon his representations and put the diseased sheep in the same pasture with sheep which he had raised and which were free from disease, with the result that the latter became infected and diseased, and many of both flocks of sheep died. The vendee wishes to bring an action against his vendor. What kind of action would you advise him that he can bring, and what will be the measure of damages, if any?

THIRD AND FOURTH JUDICIAL DEPARTMENTS.

Albany and Rochester, January 16, 1902.

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EXAMINATION PAPER.

Afternoon — Four Hours.

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26.

1. On the trial of an action to recover damages for an injury claimed to have been caused by reason of the defective condition of a trolley car and its appliances so that the motorman could not readily stop the car and prevent the accident complained of, the plaintiff called X as a witness and offered to prove by him that the motorman told him one hour after the accident that the car and its appliances were in an unsafe condition at the time of the accident, and that he had reported its condition to the defendant on the evening before the accident. The defendant objected to the evidence. How should the Court rule and for what reason?

27.

2. In an action against a warehouseman for loss of goods by negligence, the plaintiff, on the trial, was permitted to give evidence under objection, exception being taken, to show that both before and since the loss of *his* goods, certain goods of other parties had been erroneously delivered from the same warehouse through defendant's negligence. Plaintiff obtained a verdict. Defendant appeals, the foregoing being the only exception in the case. How will the appeal result and why?

28.

3. On the trial a material witness for the plaintiff was asked on his cross-examination by the defense for the purpose of impeachment, if when he left his last employer, he

did not take away some articles which did not belong to him. The witness answered in the negative. Subsequently the defense called the employer, who, under objection, was permitted to give evidence tending to show that the answer of the witness was untrue. Exception was taken. Was it well taken or not? Give your reasons and state the rule.

## 29.

4. Objections had been duly filed to the probating of the last will and testament of B on the ground that at the time of its execution, B was of unsound mind. A, not an expert, and exceedingly illiterate, but who was a witness to the will, was asked on the trial, whether or not, in his opinion, B was of sound mind when he executed the will. Objection is made that the witness is not an expert or qualified to answer. Should the evidence be received or not? State your reasons.

## 30.

5. A sued B to recover damages for breach of promise to marry. On the trial the court, under defendant's objection, permitted the plaintiff to prove that the defendant was generally reputed to be a wealthy man. Was the evidence competent or otherwise? On what theory?

## 31.

6. A with felonious intent to burn the barn of B procured camphene and other combustibles and placed them in his room and then went and solicited C to go and get the articles mentioned and use them in burning the barn of B. C promised but neither did anything to that end or ever intended to. What, if any, crime is A guilty of?

## 32.

7. A married B, and while she, B, was living and his lawful wife he married C; then B died and afterward he married D and for his last marriage he was indicted for bigamy. Guilty or not guilty. Give your reasons.

## 33.

8. John Doe was put upon trial on an indictment for assault in the second degree against A. Doe being a witness in his own behalf, on cross-examination was asked if he did not, at a given time and place, before the alleged offense, feloniously break into the house of B, which he denied. The prosecution then called B, who testified, against the objection of Doe, that the latter did commit such burglary. The defendant took an exception to the ruling. Doe was convicted. He appealed. Will the conviction stand? State your reasons.

X

## 34.

9. A being the owner of and having in his possession a promissory note made by B for \$5,000 and interest, payable to bearer, sells it to C for value. He did not indorse it, neither did he warrant it nor make any statement or representations in regard thereto. He knew, however, that a bank check of B's had been dishonored the day before for non-payment, and that he had been sued on another debt, but believing that B was nevertheless solvent, he made no mention of the facts. B was not solvent and the note was not paid at maturity. C consults you. Has he a cause of action against A under the circumstances? State fully.

## 35.

10. A servant sued his master for negligence. On the trial it appeared that the servant was directed to do a particular piece of work that required special knowledge and skill on the part of a co-employee who was detailed to assist him in its performance. The co-employee was drunk at the time the work was done, a fact, however, unknown to the servant, who relying on the competency of the co-employee, undertook to do it properly and was injured because of the then condition of the co-employee. The above facts appearing both sides move for judgment. Judgment for whom, and why?

**36.**

11. A and B were tenants in common of a farm, of which A was in possession with the acquiescence of B. A sowed the farm to rye, and in due course of husbandry, reaped and stored in his barn 1,000 bushels thereof. B demanded one-half of the rye as his share of the annual product of the farm and being refused took possession of the same, without A's consent. B refused to return the same on demand. What remedy has A under the circumstances?

**37.**

12. A drew his own will and signed it. A few days later B came to his house on a visit and A exhibited the will and his signature to him, and said, "B, that is my will and I want you to sign it as a witness," and B did so, then and there in A's presence. A laid the will aside and forgot about it for upwards of six months, when he took it to a neighbor, some distance away, B not being present, and repeated his statement, as above, and the neighbor signed his name as a witness also, under B's signature. The will had no attestation clause, nor did the witnesses give their respective places of residence. Question arises as to the sufficiency of the execution of the will. What do you say? Give your reasons.

**38.**

13. A married woman died intestate leaving a husband, two sisters and a mother, but no descendants her surviving. Her estate consisted of \$100,000 in government bonds. How shall it be distributed?

**39.**

14. The will of A gave the sum of \$100,000 in four per cent. government bonds to B in trust to collect the income thereof and to apply \$2,000 of the same annually to the support, education and maintenance of his infant son John; the surplus income to be added to the principal until John became of age. After that period, John was to have the in-

come of the whole fund until he was thirty years of age, at which time the trust was to cease and the entire fund paid over to him. John was sixteen years old when his father died. John arrives at the age of twenty-one years and asks your opinion as to the validity of the trust. What would be your advice?

40.

15. A, while in peaceful possession of a certain lot of ground under claim of lawful title, in good faith, made permanent improvements thereon of the reasonable worth and value of \$10,000. The true owner now seeks the aid of equity to establish his title. What should the court decree as a condition of granting relief, and for what reason?

41.

16. Your client placed in the hands of his agent \$5,000 to be invested by the latter in bonds and mortgages. Instead of doing so, the agent used one-half of the fund in the purchase of a paid-up policy of insurance on his life in the sum of \$5,000, which he made payable to his wife. The wife was ignorant of her husband's fraud, and in entire good faith, demands the amount of the policy after the agent's death. Has your client any rights under the circumstances? If so, what are they and how would you enforce them?

42.

17. A stood by and allowed B to sell and deliver, as his own, A's horse to C for \$500 in cash. A said nothing at the time for the reason that he was not requested to speak. A now seeks to recover his horse from C, and consults you as to his position. What would be your advice?

*f 7<sup>th</sup>*

43.

18. A State banking corporation subscribed for the stock of a railroad company having no authority under its charter or under the statutes so to do. This it does in the name of one A, on condition that the bank and A shall share the profits. After the stock is allotted by the railroad company to

A, he refuses to deliver to the bank its share of the stock or profits. The bank has done nothing in performance of the contract. It sues A. What should be the result and why?

**44.**

19. Three railroad companies of the State of New York, X, Y, and Z, are consolidated and merged into one corporation. All three companies owed at the time of the consolidation floating debts of equal amount. X Railroad Company was solvent and its creditors had ample equitable liens upon its property. The other constituent companies were insolvent and there was nothing out of which their unsecured creditors could be paid. After the consolidation a conflict arose among the creditors of the respective constituent companies, relative to the priority of their claims. What are the rights of each group of creditors with reference to equitable liens upon the property?

**45.**

20. A corporation sold and conveyed its real estate to A, who purchased in good faith and for full value. The proceeds of this sale were lost in a bad investment. The remainder of the corporate assets consisted of personal property which the stockholders divided among themselves in the proportions of their holdings in the stock of the company. The creditors of the company were not paid and ask you whether they are entitled to recover the amount of their claims out of the real estate sold to A, and the value of the personal property divided among the stockholders. What do you advise? State your reasons.

**46.**

21. A is a resident of a country town; his family consists of a wife, a minor son, his wife's minor daughter by a former marriage, his wife's mother and his paternal and maternal grandparents. He refuses to support his family, although he is financially able to do so, and no member of the family has any other means of support. What members of the family

can he be compelled by law to support, and how can the law be enforced?

**47.**

22. A was married to B, and thereafter absented himself for five successive years without being known to B to be living during that time. Immediately after the period of five years had passed B married C, both acting in good faith. A child was born of the second marriage. After the birth of the child A returns, and A, B and C, ask your advice as to the character of the second marriage, whether the child is *legitimate*, and what course should be taken to protect the rights of all without giving offense to law or morality. What do you advise?

**48.**

23. Certain buildings belonging to a ward were burned and A, the general guardian, collected the insurance money and without obtaining an order of the court, erected other buildings on his ward's land at a cost of \$2,000 in excess of the amount of insurance money. The said sum of \$2,000 was advanced by him personally, from his private funds, without first obtaining an order of the court authorizing him to do so. On coming of age the ward sold the entire property, but refused to reimburse A for the \$2,000 advanced by him. A brings a suit for his reimbursement. Can he succeed? State your reasons.

**49.**

24. A leased to B for a term of twenty years, his farm of 100 acres of land upon the following terms. For ten years the land was to be used by B solely for farming purposes, and A was to receive an annual rental of \$500. It was provided in the lease that at the end of the tenth year for a period of ten years thereafter, in addition to the first period of ten years, B was not to work the land as a farm but was "to search for, explore, excavate, dig and carry away iron ore on and from said lands" with the "right to erect thereon all constructions and appliances necessary for mining, washing, loading and moving iron ore." A was to receive from B a royalty on all ore mined and shipped of twenty-five cents

per ton. A dies, and his heirs claim that the lease is invalid under the Constitution of the State of New York. Your advice is asked. What do you advise?

**50.**

25. Your advice is asked upon the constitutionality of a bill proposed to be introduced in the Legislature entitled as follows:

“An Act discontinuing the highway passing across the lands of John Doe in the town of Macedon, in the county of Wayne to the Erie canal, and for the allowance of the claim of John Doe against the State of New York for the maintenance of said highway.” What do you advise? State your reasons.

FOR THE STATE OF NEW YORK.

New York and Syracuse, October 20, 1903.

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EXAMINATION PAPER

Forenoon — Four Hours.

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51.

1. Draw a complaint in an action in the Supreme Court in favor of the payee and against the maker of a promissory note. Omit verification.

52.

2. State what must be shown in order to obtain a writ of replevin at the time an action to recover a chattel is commenced in the Supreme Court.

53.

3. On the trial of an action for breach of a contract in which the defendant did not plead as a defense the statute of frauds, the testimony established, without objection, that the contract was void under the statute. At the close of the testimony the defendant moved for judgment on the ground that the contract was void. What should the ruling of the court be, and why?

54.

4. How would you compel a person to produce upon a trial or hearing a book of account?

55.

5. In an action for goods sold and delivered the defendant's answer pleaded payment as a sole defense. On the trial both sides demanded the right to open the case to the jury and to adduce his evidence first. The court decided in favor of the plaintiff. The defendant excepted and appealed from

a judgment in favor of the plaintiff and urged the above exception as the sole reason why it should be reversed. What should the ruling of the Appellate Tribunal be, and why?

56.

6. On June 2, 1895, A duly docketed a judgment in the Erie county clerk's office against B for \$5,000 damages and costs. State under what circumstances you can issue an execution on the judgment in 1903, B still residing in Erie county.

57.

7. A executed and delivered to B a mortgage, dated June 1, 1900, on his real property for \$2,000 in cash loaned to him at the time. B never recorded the mortgage. At that time A was justly indebted to X in the sum of \$4,000, which he could not otherwise pay, except by deeding to him the land in question. X searched the records and finding the premises free and clear of all incumbrances and acting in entire good faith and without knowledge of B's mortgage, took a deed dated August 1, 1900, of the same from A in full payment and satisfaction of his debt, which deed he put on record at once. B then learned of X's deed, and that it was recorded, and thereupon consults you as to his rights in the premises. The fair market value of the property is \$4,000. What would be your advice, and why?

58.

8. A tenant in possession of a factory under a lease took out an engine, the property of the landlord, which was on the premises when hired and included in the lease, and erected on the foundation from which he took the old, a new engine for the purpose of carrying on his legitimate business upon the demised premises. The tenant's term is about to expire and he wishes to remove from the premises the new engine and to replace the old one where he found it which he can do without injury to the premises. The landlord claims title to the new engine, and forbids its being taken away. The tenant consults you. What do you say?

## 59.

9. A died intestate leaving real property. His only heirs-at-law him surviving are a grandchild, who is a son of a deceased son, and three grandchildren, daughters of a deceased daughter. How will A's real estate descend?

## 60.

10. A and B were members of the same social club. During A's absence in Europe, B learned that A was "posted" at the club for non-payment of dues and B paid the amount in full, without any request by A to do so. Upon A's return B informed him of the payment made for his account and A promised B to reimburse him therefor, but neglected to do so. B brings an action against A to recover the amount. A defends. Who wins and why? State fully with your reasons.

## 61.

11. Two members of the New York Produce Exchange, X and Y, entered into a contract in writing, July 1, 1902, whereby X purchased of Y 10,000 bushels of wheat, at the then market price for delivery January 1, 1903, but the contract provided that both parties waived the actual delivery of the wheat, and that on January 1, 1903, settlement should be made by the payment by X to Y of the amount of any decrease in the market price of the wheat, and Y should pay to X, the amount of any increase thereof. January 1, 1903, the price of wheat in the market was ten cents per bushel higher than it was July 1, 1902. X demands from Y the payment to him of \$1,000. Y consults you as to his liability. What is your advice to him. State fully with your reasons.

## 62.

12. X and Y, under an agreement in writing, entered into a copartnership as millers, under the firm name of X & Y. X, without the knowledge of Y, purchased of A a quantity of lumber for which he gave his individual note payable to the firm and indorsed by him in the name of the firm. The lumber was shipped to X individually in accordance with his order. When A sold the lumber to X and took the partner-

ship security, he did not know of the limitation of the partnership business to milling. The note was not paid at maturity and A brings an action against the firm of X & Y upon the firm indorsement. Can he recover? If so, why? If not, why not?

63.

13. A and B were copartners and duly dissolved their copartnership. Thereafter D, who held a claim against the firm which was barred by the statute of limitations, obtained from A, in the name of the firm, a written acknowledgment of and promise to pay the debt. D brings an action against A and B for the amount of the claim and B defends. Who wins and why? State fully.

64.

14. A made his promissory note to B, who indorsed the same to D for value, after forging thereon the indorsement of C. D indorsed the note to E for value, before maturity, but "without recourse." Upon the maturity and non-payment of the note, E gave due notice to all whose names appeared as indorsers, but learning that A and B are insolvent, and that C's indorsement was forged, asks you whether he has a cause of action against D. What do you advise him and why? State fully.

65.

15. A promissory note was executed by A to B for an illegal consideration. B indorsed the note to C, who had notice of the illegality but did not participate in it; C then indorsed it to D, a *bona fide* holder for value. Upon the maturity of the note C paid the amount thereof to D and took up the note, and asks you whether he can recover thereon against A, the maker of the note. What do you advise him, and why?

66.

16. A, the owner of a restaurant, employed B to manage the same, but strictly forbade him to buy supplies on credit. C sold B supplies on time, not knowing of A's connection with the business, relying solely upon B for payment. B did not pay C the amount due him, and upon learning of A's

ownership of the restaurant brings an action against A to recover the amount of indebtedness incurred by B. Can he recover? Give your reasons.

## 67.

17. The X Co., a mercantile agency, entered into an agreement with A to furnish him, through B, its agent, information concerning the financial standing of C, a merchant. B, without the knowledge of the X Co., knowingly gave to A false information concerning C's financial condition, with intent to deceive A and benefit C. A relied upon the information and gave C credit, thereby sustaining loss. A brings an action against the X Co. to recover the damages sustained by him. Can he recover? If so, why? If not, why not?

## 68.

18. A believing B to be of age, became his surety to C for the payment by B of the purchase price of a valuable horse, sold and delivered to him by C. B refused to pay. In an action brought by C against B, the latter successfully defended on the ground of infancy. C then sued A, the surety, on his undertaking, to collect such purchase price. A defends on the ground of B's contract being void by reason of his infancy. Judgment for whom, and why?

## 69.

19. A and B made their joint promissory note for \$5,000 to C, with D as surety. Upon the maturity of the note A offered C \$100, if he would release him and look to B and D, who were solvent, for payment of the note. C accepted the offer and executed to A a release in writing. The note was not paid and C brought suit upon it against B and D who ask your advice. Have they or either of them a good defense? State fully, with your reasons.

## 70.

20. A policy was issued on the life of A, payable upon his death "to his wife." Subsequent to the issuing of the policy, A divorced his then wife for adultery. A subsequently mar-

ried C, who was his wife at the time of his death. The first wife is also alive and claims the proceeds of the policy. The question arises to whom should the policy be paid? Give your reasons for your answer.

## 71.

21. The X Insurance Company, by its agent, issued a policy of \$10,000 against loss by fire, upon B's automobile factory. The policy provided that "if a building is insured that is on leased land, the same must be specifically represented to the company, and expressed in this policy in writing; otherwise the insurance shall be void." B's factory was on leased lands, and that fact was not expressed in the policy, no reference being made thereto, but the company's agent knew of the fact when he issued the policy. A loss from fire occurred during the life of the policy, and the company disputes its liability, claiming that the policy was void on the grounds stated. B sues, and the company defends. Judgment for whom, and why?

## 72.

22. A allowed B the use of his valuable family horse for the day without pay. B drove to a neighboring village, and stopping at the hotel for dinner, intrusted the care of the horse to a hostler, through whose negligence the horse was so badly injured as to be worthless. The hostler and his landlord are both irresponsible. Who must stand the damage? Give your reasons.

## 73.

23. A made a contract with B, a boarding-stable keeper, to take, feed and care for his two horses for four months for compensation. During the time B hitched one of the horses to drive on his own business, without A's knowledge or consent, and while so driving, with no fault on his part, he was collided with by a runaway horse, in which collision, he, B, was badly injured, and the horse he was driving was killed. During his absence his stable took fire and burned, killing the other of A's horses, as well as several of B's, and destroying all of his other property therein, without B's fault or

negligence. What, if any, is B's liability to A? State your reasons, and the relations sustained between A and B.

74.

24. A, knowing that he was insolvent, fraudulently purchased of, and received from B, 100 dozen of knit goods on a credit of three months. A was *bona fide* indebted to C at the time, who was also engaged in the knit-goods business. C purchased of A the goods in question at a fair value to replenish his stock, the purchase price to be applied on his antecedent debt. At the time C purchased and received the goods, he had no knowledge of A's insolvency, but believed him to be otherwise, and acted in good faith. The next day A was closed upon executions. B, who has not received pay for his goods, consults you. What do you advise him, and for what reasons?

75.

25. An agent with express authority to sell goods, not to be manufactured, warrants them to be equal to a sample exhibited. Relying on the warranty, A purchases. The goods were not equal to the sample, and there was a breach of the warranty to A's damage in the sum of \$5,000, to recover which he brings action. On the trial it was proven that the agent had no express authority to make the warranty, which fact, however, was unknown to A. On the above facts both sides rested, and moved for judgment. Judgment for whom, and why?

FOR THE STATE OF NEW YORK.

New York and Syracuse, October 20, 1903.

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EXAMINATION PAPER.

Afternoon — Four Hours.

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76.

1. In an action brought to recover the value of certain stone used in the construction of a bridge on defendant's road, the defense was that the stone was sold and delivered to X, who had the contract to build the bridge and to furnish the materials. Plaintiff offered to prove that the stone in question was drawn and delivered under the direction of A, defendant's chief engineer, and his promise to pay on behalf of the defendant. Objection was made to the testimony because of want of proof of the engineer's authority. Plaintiff then offered testimony to prove a previous similar purchase of cement used in the construction of the bridge, which was paid for by the defendant. Objection is made to this testimony. What should the ruling of the Court be, and why?

77.

2. At the time of the execution of a lease in writing, under seal, wherein the landlord let and rented certain premises to B for a term of five years, the landlord orally agreed that if the premises next adjoining the leased property should be destroyed, at any time during the term, that the tenant was authorized to terminate the lease, but no such clause was inserted therein. The premises next adjoining was destroyed during the term and the tenant elected to end the lease and moved out, after notifying the landlord and paying his rent up to the time he quit. The landlord thereupon sued the tenant for the balance of the rent re-

served by the lease. On the trial of the action the tenant offered to prove the landlord's oral agreement made at the time the lease was executed. Objection was made. What should the ruling of the Court be, and why?

78.

3. On the trial of an action, involving questions of pedigree, the plaintiff offered to prove by A, that he heard the father of B, the defendant, who is at the time of the trial residing in Europe, state, under circumstances as to preclude any presumption of interest or bias, that B, his son, was born in New York city on March 10, 1876. The question as to the date of B's birth being material to the issue, should the Court admit or exclude the testimony on the state of facts above presented, objection having been made thereto. State your reasons.

79.

4. On the trial of an action for divorce, founded upon an allegation of adultery, the husband, who was the plaintiff, called his wife, who was the defendant, as a witness in his behalf. The correspondent, who was a party to the action, objected to her being sworn as a witness on the ground that she was not competent to testify. State the rule governing the competency of the wife under the circumstances.

80.

5. On the trial of an action for damages for causing the death of plaintiff's intestate by the collapse of a bridge after much testimony had been given describing the bridge and its condition, a competent engineer was called as a witness by the plaintiff, and he was asked, after stating that he had inspected the bridge immediately after the accident, "What, in your opinion, caused the bridge to collapse?" Objection is made to the question. What do you say? Give your reasons.

81.

6. A burglar, while engaged in burglarizing B's house, without a design to effect death, but solely in aid of his es-

cape, shot at B and killed C, a bystander. Of what crime is the burglar guilty? State your reasons.

## 82.

7. A, B and C were jointly indicted for a misdemeanor. You appear for A, and on the trial demand that he be tried separately. The district attorney objects and the Court decides against you. The three are tried together and all found guilty. Error is predicated on the decision of the trial court. Should the conviction stand? If so, why so, if not, why not?

## 83.

8. A, in the daytime, feloniously took from in front of B's store, where the same was displayed, an overcoat of the value of \$10, B's property, and, on being pursued by officers of the law, was aided to escape from arrest by C, who knew that A had stolen the coat. Of what crime is C guilty of, if any? If not any, why not?

## 84.

9. Doe and Roe, meeting on a highway, had a dispute. Doe, while standing within striking distance of Roe, lifted an axe which he was carrying, as if he was about to strike Roe with it, at the same time saying to Roe: "I will brain you with this axe," but desisted and did not strike. Roe consults you as to whether under the circumstances he has a cause of action against Doe. What do you advise? Give your reasons.

## 85.

10. A and B were the owners of adjoining farms. A's ox gored B's ox through the fence which separated the two farms, causing the death of B's ox. A's ox was not known to be vicious and there was no negligence on the part of either A or B in properly maintaining the division fence. A and B both consult you and ask upon which of them the loss of the ox must fall. What do you advise them, and why? State fully.

## 86.

11. A farmer owned a farm which was crossed by a railroad track over which was the usual farm crossing, with a

gate in the fence on either side. While attempting to drive a flock of sheep across the railroad track upon the farm crossing, the sheep bolted and ran along the railroad track. A train approached, seeing which the farmer went upon the track to rescue his sheep from destruction and was himself struck by the train and killed. Upon the trial of an action against the railroad company, brought by the wife of the farmer as administratrix, to recover damages sustained by his death, the only question at issue was the alleged contributory negligence of the farmer. Was the plaintiff entitled to recover? State fully, with your reasons.

## 87.

12. A, a minor, having a natural father and mother, B and C, was duly adopted by D. A's natural father, B, died intestate, leaving an estate of \$12,000 in cash. He was survived by A and E, a daughter, and by C, his widow, natural mother of A and E. Immediately after the death of B and before his estate was administered A died intestate. Who are entitled to share in B's estate, and what is the amount to which each is entitled?

## 88.

13. Two farmers, A and B, each owning 100 acres of land, exchange their estates by mutual conveyances in which their wives do not join. A dies intestate. His widow claims dower in both estates. What are her rights? State fully, with your reasons.

## 89.

14. A citizen of New York, who was a soldier in the United States army, was fatally shot in a battle with Indians. Immediately thereafter and before his death on the field of battle, realizing that he must die, and having no facilities for writing a will, he stated to three comrades that it was his will that all his property should go to his sister, Mary, and requested them to put it in writing and witness the same at the first opportunity, with which request they complied. A contest has arisen between Mary, the sister, and John, the brother, of the deceased, Mary claiming to

take all the property of the deceased brother, and John claiming half of the property under the statute of distribution. Who wins and why? State fully.

## 90.

15. A was the owner of a fine farm of 100 acres of land, with good buildings, capable, under proper management, of paying the interest on a valuation of \$10,000, which sum the farm was reasonably worth. A was induced by B to sell him the farm for \$1,000, which sum B paid to A in cash and took possession. A, moved by the injustice of his act to his family, tendered to B the \$1,000 paid by him and demanded the reconveyance of the farm to him and brings a suit to set aside the sale on the ground of inadequacy of consideration. In whose favor will judgment be granted? Give your reasons.

## 91.

16. A widow had four children, all of whom, except a son, A, were minors. Her real estate was encumbered by a mortgage, and, being unable to pay the interest, she conveyed the same to A without consideration in pursuance of a parol agreement by A to hold the same for the benefit of the children, including himself. A was to have the accruing rents and his board in the family, and was to pay the interest on the mortgage and the taxes on the property. The widow died. A continued to perform his agreement for some time thereafter. He finally sold the premises and with the proceeds of the sale purchased other real estate and took title in his own name. He thereupon repudiated his parol agreement and claimed to be the sole owner of the property. Have A's brothers and sisters any remedy against him? If so, what? Answer fully, stating your reasons.

## 92.

17. A executed a mortgage to B for \$5,000, which was usurious, in that A received from B but \$4,000. After paying the interest on the mortgage for some years A died, leaving a will whereby he devised the mortgaged lands to

C. C asks you how he can rid his land of the mortgage without paying it off. What is your advice to him? Give your reasons.

93.

18. The X corporation, being insolvent, B, its president, well knowing its insolvency, procured A, his wife, to institute suit to recover judgment on a past-due promissory note of \$5,000, given by the corporation to her, for value, which she did, and recovered judgment by default. You are consulted as to the validity of the judgment. What do you advise, and why?

94.

19. X was a corporation organized for the purpose of the manufacture and sale of beer and malt. Y, one of its directors, was required to furnish a surety for the payment of the rent of the house which he rented of A. In pursuance of instructions by resolution of the board of directors, unanimously passed, the X corporation, by its authorized officers, became such accommodation surety for Y, who failed to pay the rent when due, whereupon A sued the X corporation as surety to recover such rent. If you were consulted, what would you advise as to X corporation's liability; and, if you defended, upon what ground would you base your defense?

95.

20. The board of directors of a domestic corporation, which had no surplus profits coming from its business, borrowed on the notes of the corporation \$50,000, which was used in making dividends on its capital stock, pursuant to a resolution of the board, two of its seven directors duly dissenting. Certain creditors of the corporation consult you as to the legality of the transaction, and what and against whom, if any, liability exists therefor? What do you advise?

96.

21. A wife procured an insurance on the life of her husband for \$7,500, payable to her upon his death. The annual premium therefor was \$750, which was paid by the husband out of his own property. The husband died leav-

ing no property, but debts to the amount of \$5,000. There are \$7,500 due from the insurance company upon the policy aforesaid. To whom will it go?

97.

22. A was the illegitimate child of B and C. After its birth B and C intermarried, and thereafter B, the father, died intestate, leaving C, his widow, and A, the child, and X, his father, him surviving. He died leaving both real and personal property. To whom and in what proportions will the property descend and be distributed? Answer specifically.

98.

23. A husband acquired \$10,000 in property from his wife by antenuptial contract. After the marriage the wife became indebted to X in the sum of \$5,000. She is insolvent, and her husband refuses to pay the debts. What are the husband's duties and responsibilities in the premises?

99.

24. The Legislature of the State of New York passed an act prohibiting and subjecting to punishment as a crime the selling of tickets for passage on vessels or railroad trains, by any person except common carriers and their specially authorized agents. Is the act constitutional or unconstitutional? State fully your reasons.

100.

25. The Legislature passed an act authorizing the X Street Railway Company to construct and operate its road along and through a public highway, to the center line of which the abutting owners had title, provided only that the consent of the commissioner of highways in that district be obtained by the company, which was done. In pursuance of the act the railway company has begun the construction of its road. The abutting owners desire, if possible, to prevent such construction and consult you. Is there any relief? What advice would you give them? What constitutional provision is involved?

## FIRST AND SECOND JUDICIAL DEPARTMENTS.

New York and Brooklyn, April 22, 1902.

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### EXAMINATION PAPER.

Forenoon — Four Hours.

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#### 101.

1. Your client hands you a promissory note for suit. Draw a verification to a complaint thereon to be made by yourself as plaintiff's attorney.

#### 102.

2. A has a cause of action against B which will outlaw in a day. He desires you to sue thereon at once. Upon inquiry made at B's place of residence you are informed that he is absent from home and will not return for thirty days. You cannot learn his present whereabouts. What could you do under the circumstances?

#### 103.

3. What is an injunction order, and in what cases may it be granted in an action?

#### 104.

4. You serve a verified complaint in an action on a promissory note made by the defendant. He answers by a verified general denial. It is certain to a demonstration that his answer is false, and you can procure and serve many affidavits to establish that fact. Can you have his answer or defense stricken out on motion? Give your reasons.

#### 105.

5. How and when must a subpoena *duces tecum* be served to compel a person who lives fifty miles from the court-house to produce upon a trial a book of account?

106.

6. On the trial of a civil action in a court of record, how many jurors may each party challenge peremptorily?

107.

7. The lease of a store provided that the landlord would make all necessary repairs. A skylight became out of repair during the term and for a number of days because of it, rain leaked through on the tenant's stock of silk directly under the same. He notified the landlord, who promised to make the repairs, but did not. The landlord subsequently sued for rent and the tenant set up as a counterclaim thereto the loss and damages sustained by reason of the injury to his property. What is your opinion as to the rights and remedies of the parties to the action? State them.

108.

8. A devises a piece of real property to his son B for life, with remainder over to C on B's death, with power to B, during his life, to sell the same and devote the proceeds to his own use. A creditor has obtained a judgment against B and is about to sell the property under an execution. C consults you. What are his rights and remedies, if any?

109.

9. A testator devised to his executors in trust, his certain farm, with directions to collect and pay over the net income thereof to his five children during their joint lives and on the death of the survivor to sell the same and to distribute the proceeds as designated, giving and granting to his said executors power at any time in their discretion during the continuation of said trust, to sell the farm and make an immediate distribution as therein provided for. Question arises as to the validity of the trust. What do you say? Give your reasons.

110.

10. A, a man thirty years of age, who had ceased to be a member of the family of B, his father, a wealthy man, while

traveling, became sick, and being without funds and in great distress, was properly cared for at the expense of C, a citizen of the place where he then was. After A recovered and all of his expenses had been paid by C, B wrote a letter to C, promising to pay such expenses. B did not pay the expenses and C sues him for the amount thereof. Judgment for whom and why? State your reasons.

### 111.

11. A farmer, A, was indebted to B, in the sum of \$100. He sold to C 200 bushels of oats at 50 cents per bushel. C paid A no money for the oats, but promised to pay B the \$100 which A owed him therefor. This was satisfactory to B. C did not pay B and B sues C, who defends on the ground that he has never had any dealings with B and owes him nothing. Who wins, and why?

### 112.

12. A and B were co-partners doing business under the firm name of A, B & Co. A was indebted to C upon a personal matter not connected with the business of the firm, and when C pressed A for payment, he gave to C for the amount of his debt his promissory note, payable to the order of himself, which, without consulting B, he also indorsed in the partnership name. The note was not paid at maturity and the firm received notice of presentment and non-payment. An action is brought against A, B & Co., as indorsers, and B consults you. What do you advise him? State fully.

### 113.

13. A and B are co-partners. A is satisfied that he is entitled to receive from the profits of the firm a large amount of money which is in B's hands, and which he desires to obtain as soon as possible. He has demanded the money from B, who refuses to pay it over. He desires you to bring an action against B to recover the amount. What do you advise A? State fully.

## 114.

14. A was the holder of a promissory note, of which B was the maker and C was the indorser. Before the maturity of the note, C asked A to let the note run another year, to which A replied that he would do so if C would "let his name be on it, and let it be as it was." To this C assented. At the maturity of the note, A did not present the note for payment nor give notice to C of non-payment. At the end of the year the note was not paid and A brings suit against C as indorser. C defends upon the ground that he was discharged as indorser by failure of presentment and notice and that his assent to the extension of time was without consideration. Who wins? Why?

## 115.

15. On the 1st day of February, 1896, A made his promissory note for \$1,000, with interest, payable to the order of B, on demand. B demanded payment February 15, 1902, and payment being refused, he brings suit against A. A defends, setting up the statute of limitations. B insists that he had a reasonable time within which to demand payment of the note before the statute of limitations began to run. Judgment for whom? State your reasons.

## 116.

16. A applied to B for a loan upon bond and mortgage. B referred the matter to his agent, C, with instructions to examine the title to the real estate and approve or disapprove the loan. C found the record title to be in A, and clear from incumbrances, but was informed by A that he had theretofore executed a deed of the real estate to D as security for a loan, but that D had withheld the deed from record and had permitted A to remain in possession of the premises. C colluded with A to keep the knowledge of the prior unrecorded deed to D from B, and made a report to B, approving the loan. B made the loan and recorded his mortgage. Subsequently, D put his deed on record. B begins a foreclosure of his mortgage. D defends, alleging that the notice of his deed given to B's agent, C, was notice to B. Judgment for whom, and why?

## 117.

17. A passenger on a railroad train angered the conductor of the train by a caustic criticism of the conductor, who thereupon assaulted the passenger, wilfully and wantonly, and inflicted a malicious injury upon him. The act of the conductor was in violation of the rules of the railroad company, of which he had due notice. The passenger sues the railroad company for damages. The railroad company defends upon the ground that the conductor in doing the acts complained of was not acting within the scope of his employment. Judgment for whom, and why?

## 118.

18. A and B, co-partners, dissolved. B took the partnership property and agreed with A to pay the partnership debts. Thereafter a firm creditor, with knowledge of the facts, and of B's agreement, took B's negotiable promissory note, payable in three months, in settlement of his firm debt. B was then solvent. The note was not paid at maturity, and B having in the meantime become insolvent, the creditor returned it to B and then sued A and B, as co-partners, on the original debt. A consults you. What are his rights and liabilities under the circumstances?

## 119.

19. A, while in B's employ as a clerk, stole from B \$500, for which B discharged him. A was penitent and wanted B to take him back into his service. B agreed on condition that A give his bond, with a surety, for the honest performance of his duties, etc. Thereupon A furnished such bond, with C as surety, and again entered B's employ. C was ignorant of A's former offense. Soon A stole \$300 of B and decamped. B demands of C to make good the amount. Has C a defense or not? If so, what? If not, why not?

## 120.

20. In 1896 a husband insured his life in the sum of \$10,000 for the benefit of his wife. He paid the premiums thereon for five years, and then surrendered the policy to

the company in consideration of \$500, paid therefor, which canceled the same. The husband died soon thereafter. The wife knew nothing of the policy until after the husband's death. She now consults you. What do you advise as to her rights, if any, under the circumstances?

121.

21. A fire insurance policy was issued to A, insuring his stock of boots and shoes in his retail store for one year from May 1, 1901. He sold his entire stock in due course of trade during the months of May, June and July, 1901, and closed his store for a two months' vacation. In October, 1901, he bought a new stock of goods and resumed business at the old stand. A fire accidentally occurred in December, 1901, causing a large loss which the company refused to pay, claiming that the company had not insured the boots and shoes in question. What, if any, are the rights of A, and the obligation of the insurance company? State your reason?

122.

22. A hired of B his horse, to work with his own, for the month of August, 1900, for a given price, which was to be returned to B at the expiration of the month. A, not having quite finished his contemplated work, thought to keep the horse a little while longer, which, without the consent of B, he did. On the night of the third of the following month, the stable wherein A kept B's horse, without any fault or negligence on the part of A, accidentally took fire, and B's horse, as well as A's, together with a large amount of other property belonging to A, were consumed by fire. B sued A for the value of his horse. A answered, setting up the facts, and that the destruction of plaintiff's horse was not caused by any fault or negligence on his part. B demurs to the answer. Judgment for whom, and why?

123.

23. In an action against a warehouseman, the plaintiff proved the delivery of his carriage to the defendant for stor-

age during the winter for hire, a demand for the return of the same, a refusal to deliver, and its value. He then rested. The defendant thereupon proved that on a certain night the warehouse, wherein the plaintiff's carriage was stored, was destroyed by fire, and its contents, including plaintiff's carriage, were totally consumed, and then rested. Both sides moved for judgment. Judgment for whom, and why?

124.

24. A sold and delivered to B on a credit of sixty days, his coach team for \$600. The contract of sale, which was verbal, provided that title should remain in A until B paid for the horses. At the time of the purchase B was indebted to C in the sum of \$700. Within ten days after the horses had been delivered to B, C purchased the horses of B, in extinguishment and satisfaction of his debt against B aforesaid, C having no knowledge of the nature of the contract between A and B. B gave to C a bill of sale of the horses, warranting that he, B, was the absolute owner and could convey good title thereto. The sixty days having expired and B not having paid A, what, if any, remedy has A?

125.

25. A sold and delivered to B a horse for the agreed price of \$500, and took from him in payment and discharge of his debt, the note of C, which B indorsed "without recourse." Both A and B honestly supposed at the time of the transaction that C was abundantly responsible, but it turned out that he was then insolvent, and the note worthless. A proffers back the note and sues B for \$500, the purchase price of the horse. B answers, pleading payment and sets up the facts aforesaid. A demurs to the answer and asks for judgment. Judgment for whom? On what theory?

FIRST AND SECOND JUDICIAL DEPARTMENTS.

New York and Brooklyn, April 22, 1902.

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EXAMINATION PAPER.

Afternoon — Four Hours.

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126.

1. On the trial of an action, a question of fact was presented. The plaintiff was sworn as a witness on his own behalf. He testified to the fact, and was neither impeached nor contradicted. He was the only witness sworn. When the plaintiff rested his case, the defendant stated that he had no witnesses, and asked to go to the jury. The plaintiff moved for judgment. What should the ruling of the Court be, and why?

127.

2. An attorney rendered to his client a bill for services in the sum of \$500. His client neither made nor tendered payment and the attorney thereafter sued him in *quantum meruit* for \$1,000. On the trial, defendant objected to the attorney's showing that his services were worth in excess of the \$500 for which he had rendered his account. What should the ruling of the Court be, and why?

128.

3. Before a written contract for the purchase by A of B's store and good will was executed, B agreed that he would not open a store of the same kind in the village, where the store was situated, for a period of five years. That agreement was not inserted in the contract because B said it was unnecessary. The sale was consummated and immediately thereafter B opened a similar store in the village and is now actually engaged therein, in the same line of business,

in competition with A. A consults you. What would be your advice, and why?

129.

4. On the trial of an action, an opposing witness swears to a fact material to the issue. You have a witness in Court who will swear, that in a conversation with him, the opposing witness stated the fact to be diametrically opposite to the evidence he has given. What should you do, if anything, to enable you to give the evidence of your witness?

130.

5. On the trial of an action, B, a competent expert witness, was called by plaintiff and after testifying that he was present in Court and had heard and remembered all that A had testified to concerning the facts and circumstances of B's death, was asked this question: "Based on what you heard A testify to, what, in your opinion, was the cause of C's death?" Objection was made. What would be the correct ruling on the question? Give your reason.

131.

6. On the trial of an indictment for grand larceny, the jury having agreed, came into Court and rendered their verdict of guilty. It was received and recorded, and then the prisoner, who was in the jail during all this time, was sent for, and having in open Court waived the appointment of a time for pronouncing judgment, was sentenced to State's prison. What is your opinion as to the validity of his sentence? Why?

132.

7. The prisoner was indicted for perjury. On his trial it appeared as part of the prosecution's case that the facts that the prisoner swore to and for which he was indicted were material to the issue involved and might have affected the result, but that the defendant did not know the materiality of the false statement made by him and that the same did not in fact affect the trial. At the close of the People's case, the prisoner's counsel moved for his discharge on the

above grounds. What should the ruling of the Court be, and why?

133.

8. A was indicted for robbery. On his trial it appeared that he feloniously took B's watch from the latter's person at midnight on a public highway. The watch, which was worth \$30, was gone before B was aware of the transaction, but he discovered his loss almost simultaneously and started in pursuit of A, who, being at the time armed with a loaded pistol, pointed the same at B. B, under the influence of the force and fear of the loaded pistol, allowed A to escape. He was subsequently arrested and indicted as hereinbefore set forth. Was A guilty of the crime of robbery under the circumstances? If so, in what degree? If guilty of any other crime, what, and why?

134.

9. A had upon his land a large spring of excellent water, whose flow was sufficient for use in the farm house and barns. It was the only water upon the farm. B, the owner of the adjoining farm, without intending to injure his neighbor's spring, sunk a well near the boundary line between the two farms, which had the effect of ruining the spring on A's land by drawing off the water therefrom, leaving the spring dry. There was nothing upon the surface to indicate, and no one had knowledge of, the existence of a subterraneous stream between the spring and the well. A sues B for the damages sustained by him from the loss of his spring and B consults you. Do you advise him to settle or to defend, and why?

135.

10. A child of two years of age was permitted by its parents to play unattended in a country road which was a public highway. A traveler, who was driving a spirited team along the highway, did not see the child, his attention being directed to an animal in an adjoining field and the child was run over by the wagon and sustained serious injuries. The driver is sued for damages resulting from the

injury to the child and consults you. Do you advise him that he has or has not a good defense? State fully your reasons.

136.

11. A entertained a dislike for B, a merchant, and C, his coachman, and, prompted by malice, A said of B and C, speaking to a number of people, "Although B rides in his carriage and C is but a coachman, they are both alike, because both are bankrupts." B and C sue A for slander without averring special damage. Are they or either of them entitled to recover? State fully your reasons.

137.

12. A brother and his sister each made a will devising his and her property to John Doe, a friend. Each thereafter married and died without issue. John Doe claims both estates under the wills. The heirs at law of both brother and sister consult you as to their rights. What would you advise? State your reasons.

138.

13. A man died intestate, leaving him surviving a widow, a brother and sister, but neither children nor parents. The estate consisted entirely of personal property and after payment of debts amounted to \$4,000. What are the respective shares of the widow, the brother and the sister in the estate? State your reasons.

139.

14. A man had two sons and two daughters. He duly made his will providing for several specific legacies, but the greater portion of his estate was disposed of by the following residuary clause: "All the rest, residue, and remainder of my estate, I give, devise, and bequeath unto my two sons, share and share alike." Later he became angry at his two sons, because of their undutiful conduct toward him, and determined to change his will so that his two daughters should take the residuum of his estate instead of his two sons. He, therefore, obliterated the word "sons" in the residuary clause of his will by drawing a line through the

word with his pen, leaving, however, the word legible. He then wrote in the will over the obliterated word "sons" the word "daughters" with his initials, thus clearly manifesting his intent to effect the change in his will. After the testator's death one of the subscribing witnesses, who drew the will, testified that the changes had been made by the testator since the execution of the will. Are the sons or the daughters, if either, entitled to the residuum? Give your reasons.

140.

15. A and B, citizens of New York, entered into a contract in writing, by which A sold and agreed to convey to B a tract of land in the State of Pennsylvania. B duly tendered to A the purchase money and was entitled to a conveyance of the land, which A refused to make. B sues A in the Supreme Court, City and County of New York, for specific performance of the contract. A claims that the Court has no jurisdiction and consults you. What is your advice to him? State fully.

141.

16. A executed to B a mortgage upon his farm. Subsequently, A gave to C a second mortgage upon the same farm. A did not pay the interest on the mortgage to B, and B has begun a foreclosure of his mortgage, by advertisement, under the statute. If the foreclosure goes to sale, C's mortgage will be worthless, because the farm will not sell for more than the amount of B's mortgage. C retains you, states facts which show that B's mortgage is invalid and asks you to assert his rights and protect his interests. What will you do? State fully.

142.

17. A duly conveyed to B his farm, A remaining in possession of the premises. B neglected to record the deed. Subsequently, A became indebted to C in the sum of \$2,000, which was due and payable. To secure this indebtedness after it was due, but without any agreement to extend or suspend time of payment, A gave a mortgage upon the land which he had formerly conveyed to B. C took the mort-

gage in good faith and without knowledge of the deed from A to B. C begins a foreclosure of his mortgage. B asks you whether he has a good defense. What do you advise him? State fully, giving your reasons.

143.

18. Upon the formation of the Z company, a manufacturing corporation, A subscribed for 100 shares of the capital stock at \$100 per share, but paid in only 50 per cent. of the amount of his subscription. The company became insolvent and B, to whom the company owed \$5,000, begins a suit against A, to recover the amount, on the ground that A owed that amount upon his subscription to the stock held by him when B's debt was contracted. A defends. Who wins? Answer fully, with your reasons.

144.

19. A made a promissory note, payable to his own order, which he indorsed and then procured thereon the indorsement of B, a manufacturing corporation, for his accommodation. The note was discounted before maturity by A at the X Bank, and the proceeds thereof placed to the credit of his account in the X Bank. The note was dishonored, and due notice thereof given to B. Thereupon the X Bank brought action against both A and B to collect the note. Judgment for and against whom, and for what reason?

145.

20. A owned \$10,000 full paid stock in the X corporation, which was indebted to B, a laborer, for services, in the sum of \$500. B gave to A notice in writing within thirty days after the termination of his services, as required by the statute, that he intended to hold him liable for his debt of \$500, and without taking any other proceedings, at the expiration of thirty days more, he brought action against A for his claim. State whether or not B can recover in the action. If not, why not?

## 146.

21. While A and B, husband and wife, are living together, B, the wife, inherits a valuable house and lot in the City of X, wherein thereafter, the husband and wife reside and have a son born unto them. Subsequently B procured an absolute divorce from A, and then died intestate, owning said property, leaving A and her said son her surviving. What are the respective rights of A and the son in the property? State your reasons.

## 147.

22. A, having a wife, B, and a child, issue of the marriage, was duly sentenced to imprisonment for life, on a conviction for murder in the second degree. He was duly pardoned, after having served five years of the sentence, and desired to resume marital relations and live with his family, but B would not consent, or allow him to see the child. Thereafter B married and lived with C, retaining custody of the child. Thereafter A brought an action against her for an absolute divorce on statutory grounds, and for the custody of the child? 1st, What are A's rights in the premises? 2d, What, if any, legal irregularities is B guilty of?

## 148.

23. A and B were husband and wife; while living together, A committed a grievous assault and battery upon B, without cause or provocation, whereby she was injured for life. The wife brought an action against A to recover damages for injuries sustained. A demurred to the complaint (which set forth the facts) on the ground that the complaint did not state facts sufficient to constitute a cause of action. Judgment for whom? State your reasons.

## 149.

24. A was put on trial for the murder of B. The indictment contained two counts; the first charging murder in the first degree, while the second count charged murder in the second degree. The jury found him "guilty as

charged in the second count." On appeal, the judgment of conviction was reversed and a new trial ordered because of errors committed. On the second trial, the Court being requested by defendant's counsel, refused to instruct the jury not to find a verdict on the first count, to which refusal exception was taken and the jury found the defendant guilty of murder in the first degree. Will the conviction stand or not, and for what reason? State fully.

**150.**

25. John Doe had been duly committed to jail to await the action of the grand jury on a charge of arson. You are his counsel. Doe has made application to the Sheriff having him in custody, to be allowed a private interview with you as his counsel, which the Sheriff has absolutely refused. What, if any, right has John Doe in the premises, and, if any, on what is it based and how will it be enforced?

THIRD AND FOURTH JUDICIAL DEPARTMENTS.

Albany and Rochester, June 11, 1902.

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EXAMINATION PAPER.

Forenoon — Four Hours.

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151.

1. Draw a summons in an action for divorce with affidavit of proof of service thereof upon the defendant.

152.

2. Your client is defendant in an action where the county designated in the complaint for the trial thereof is not the proper county. You desire to move to change the place of trial to the proper county before answering. No papers except the summons and complaint have been served. State fully what you must do and in what manner to change the venue to the proper county.

153.

3. A young woman of property, 18 years of age, hires a horse and buggy of a liveryman to drive a distance of ten miles, returning the same day. She drives a distance of thirty miles and brings the horse and buggy back the third day thereafter seriously damaged. The liveryman consults you as to his remedy. What do you advise him? State fully with your reasons.

154.

4. A sues B upon a promissory note and B defends and sets up a counterclaim which A insists is sham and asks you to move to strike out as sham. What do you advise him, and why?

155.

5. A brought an action against B for assault, the summons having been personally served upon the defendant, within

the State. B appeared in the action and demanded service of the complaint which was served, but he did not answer. What are the necessary steps for A's counsel to take to obtain judgment against B? State fully.

156.

6. The sheriff has taken into his possession, under a warrant of attachment, a span of horses, as the property of the defendant, which are claimed by another person. The sheriff desires to ascertain the validity of the claim and asks you how he can do so. What do you advise him? State fully.

157.

7. A was the owner of a house and lot. Upon the marriage of his nephew B, A said to B, "I hereby give you this house and lot and will deed it to you." B took possession at once, occupied the premises and made expenditures in permanent improvements thereon, but the amount of such expenditures is less than the value of the rent of the premises while occupied by B. A died without having conveyed the premises to B, who continues to remain in possession. A's executor brings an action of ejectment against B, who defends. Has B a good defense? State fully with your reasons.

158.

8. A constructed a building for general manufacturing purposes and supplied it with a water-wheel and suitable gearing for propelling machinery. B purchased the premises, and also purchased of C, and set up planing machines in the building, which were operated by bands connected with shafting driven by the water-wheel. These machines were fastened to the floor for the purpose of keeping them in place while working, and each could be removed from the building without injury thereto or to any other machine. B gave his note for these machines, which he secured by a chattel mortgage upon all the machinery in the building, including the water-wheel, and gearing, which mortgage was duly filed. Subsequently he gave to D a real estate mortgage upon the building and all the machinery therein. Both C and D foreclose and

each claim the machinery. What are their rights respectively? State fully, with your reasons.

### 159.

9. A granted to B, by deed, a private way across his farm. Becoming angry at B, A obstructed the road so that B could not pass over it. B thereupon removed enough of the fences in A's adjoining field to enable him to pass on A's land around the obstruction. A brings an action against B for trespass. B defends, setting up the facts. Is the defense good? If so, why? If not, what should B have done?

### 160.

10. John Doe and Richard Roe entered into a written agreement, viz.: "I, John Doe, agree to employ Richard Roe so long as satisfactory to me at \$5.00 per day as engineer, and I, Richard Roe, agree to work for John Doe, on the terms and conditions aforesaid, and to give him two weeks notice in writing before quitting his employment or I forfeit to him \$100. (Signed) John Doe, Richard Roe."

Richard entered upon his work under the agreement, and subsequently left the employment without giving the notice, there being then due to him for his services \$100. John refuses to pay for the labor performed, and Richard sues for his \$100. John answers, admitting the service and value, but sets up the contract and alleges a breach thereof on Richard's part in that the notice required thereby was not given, and claims the \$100 forfeiture as an offset to plaintiff's claim. Richard demurs to the answer. Judgment for whom, and why?

### 161.

11. A and B mutually agree to marry each other on the following Christmas. Afterward, and six months before Christmas, A married C. Without any demand or refusal, B immediately and without waiting until Christmas, sued A for breach of promise. If A should consult you, what, if any, defense would you advise him he could make on the above state of facts? Why?

## 162.

12. A took the farm of B to work on shares in raising grain. A agreed with C that if the latter would plow the land, sow and harvest the crops, he should have one-half of his, A's, share, to which C assented, and performed his part of the agreement.

1st. What is the legal relation of A and B and the rights of each?

2d. What are the legal relations of B and C in the business and crops? Copartners or otherwise? Give your reasons.

## 163.

13. A and B were copartners in business, but dissolved on January 1, 1899. Notice of such dissolution was published in three newspapers, published in the city where they had their principal place of business, and in the trade papers. C, who had had actual dealings with the firm, not seeing the advertisement nor having notice of the dissolution, in good faith sold and delivered \$5,000 worth of goods, as he believed to the old firm, which were bought by A in the old firm name. He now sues A and B as partners, for the amount thereof. B defends on the ground that he was not a member of the firm when the sale was made, and neither authorized it nor was cognizant of it at any time. All of the above facts appearing on the trial, judgment for whom and why?

## 164.

14. A sold to B the right to make, use and sell a certain invention claimed by A to be patented, for which B gave to A his note as follows:

"\$500. NEW YORK, June 1, 1901.

"Six months after date, for value received, I promise to pay to A, or bearer, five hundred dollars, with interest. (Given for a patent right.) (Signed) B."

The note was duly transferred by A to C, for the full face value thereof, before maturity, who was a *bona fide* holder in due course. The note not being paid at maturity, C sued B

thereon, who answered, admitting the making, delivery, and non-payment of the note and then set up that A procured the note by fraud and misrepresentations, but made no claim that C had any knowledge thereof when he took the note, or that he was not a *bona fide* holder for value. C demurred to the answer. Judgment for whom, and why?

## 165.

15. A gave to B his promissory note as follows:

"\$1,000. ALBANY, May 1, 1902.

"One month after date, for value received, I promise to pay to B, or order, one thousand dollars with use. (Signed) A."

On the back of the note for A's accommodation C wrote, "I guarantee the payment of the within note." (Signed) "C."

A then delivered the note to B. Ten days after its maturity, payment not having been demanded of or refused by A, and no notice of dishonor having been given C, A and C were both sued on the note by B. C defends. Judgment for whom and for what reason?

## 166.

16. A, as an agent for, and with authority from B, sold a horse to C belonging to B with warranty. C knew that A was acting as agent for some one in the transaction, but for whom A did not disclose, as he readily would have done, had C inquired, and so was in ignorance of the name and identity of A's principal. There was a breach of the warranty and C sued A thereon to recover his damages, setting up the facts aforesaid in his complaint. A demurs. Judgment for whom, and why?

## 167.

17. A employed B as his agent, to purchase for him ten shares of the capital stock of a certain railroad company, at a price not to exceed par, agreeing to pay him a commission for his services. B caused ten shares of the stock of the company which he owned to be transferred on the books, and a new scrip issued therefor to A, and mailed the same to him

at par; whereupon A remitted to B the funds therefor, together with his agreed commission. About two months thereafter A first ascertained that B had sold him some of his own stock, and he then sued to have the sale rescinded and to recover from B the money paid for the stock, as well as the commission paid, not claiming that he had been defrauded. The complaint stated the facts, to which B demurred. Judgment for whom, and on what principles?

168.

18. A was surety to B for a debt to B from C. When the debt became due, C was solvent and A called upon B to bring an action upon the same. B neglected so to do, and thereafter C became insolvent. B now calls upon A to pay the debt and the latter consults you. What would be your advice under the circumstances disclosed?

169.

19. A and B jointly interested in a transaction, executed a bond with C as their surety. D, at the request of the principals, paid the bond, and now sues A, B and C to recover the amount paid thereon. They consult you. What are their respective rights and liabilities, if any?

170.

20. A policy of life insurance on the husband's life, is payable, in the event of his death, to the wife, if living, if not living, to their children. The husband and wife by an instrument in writing assign the policy to A in payment of their joint debt. Thereafter the wife died; then the husband. When the policy was issued, and at the time of the death of the husband, they had three children living. Question arises to whom should the policy be paid? The children claim it, so does A. What would be your advice?

171.

21. A policy of fire insurance, insured A's stock of horses, cattle, and sheep, in the sum of \$6,000, two thousand thereof being on the horses, two thousand on the cattle, and two thou-

sand on the sheep. The policy provided that "this entire policy \* \* \* shall be void \* \* \* if the subject of the insurance be personal property and be or become encumbered by a chattel mortgage." While the policy was in force, A executed and delivered a chattel mortgage on the sheep in the sum of \$1,000. Thereafter, and while the mortgage was alive, a fire took place, and all the insured property was destroyed. There was a total loss of more than \$2,000 on the cattle and sheep respectively and of \$4,000 on the horses. State A's legal position, under the circumstances disclosed. Is he entitled to recover anything, or nothing? State fully your reasons.

172.

22. A delivered to B, a miller, 10,000 bushels of wheat, for which he agreed to deliver to him in ninety days, 2,000 barrels of flour. During the ninety days, and before the miller had begun to grind the same, the sheriff levied on the wheat under an execution issued on a judgment against the miller. A consults you. What is the nature of the transaction and A's rights and remedies, if any, under the circumstances disclosed?

173.

23. A jeweler received from A a quantity of gold coin, from which he was to make a vase. The vase was to be completed and delivered to A on January 2, 1902, and A was to pay him \$500 for his services, within sixty days thereafter. The vase was completed and ready for delivery on January 2, 1902, but before it was delivered and on that day, it was attached by a creditor of A, for a debt of more than the value of the vase completed, including the jeweler's work. The jeweler protested against its being taken and claimed a lien thereon. He now consults and asks you to obtain for him, if possible, its return. What would be your advice?

174.

24. A sold to B 5,000 watch cases to be thereafter manufactured, at the agreed price of \$5 apiece. When the cases were delivered they were defective, which fact could be determined upon inspection. B with knowledge of their defects,

neither returned nor offered to return them, and thereafter sold the same in due course at their market value, and lost \$5,000 on the transaction. B is now sued for the contract price and consults you as to his right to offset his claim for damages. What would be your advice?

175.

25. A met B and said to him, "For what will you sell to me 500 barrels of flour?" B replied: "Five dollars a barrel, cash on delivery." A said, "All right, I accept; deliver the flour at my storehouse to-morrow morning." Flour was worth but \$4 a barrel when B tendered the flour to A, the next morning, which A refused to accept at the price agreed upon. B now consults you as to what he can or should do under the circumstances. What would be your advice?

THIRD AND FOURTH JUDICIAL DEPARTMENTS.

Albany and Rochester, June 11, 1902.

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EXAMINATION PAPER.

Afternoon — Four Hours.

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176.

1. Upon the trial of an action against A, B and C, former members of a firm which had been dissolved, A, who had not appeared in the action, was called as a witness for the plaintiff and was subsequently called and examined as a witness for the defendant, B, who had appeared and answered. Thereupon the plaintiff proved, under objection and exception, A's declarations made after the dissolution of the firm, in conflict with his testimony as a witness for B. Was the exception well taken? Give your reasons.

177.

2. Upon the trial of an action for groceries sold and delivered the plaintiff, a tradesman, who kept no clerk, produced his account books containing entries of the items upon which he sought to recover against the defendant, and offered them in evidence. Counsel for the defendant objected and the court sustained the objection. What was the objection and what must counsel for the plaintiff do to have the books admitted in evidence? State fully.

178.

3. A brings an action of ejectment against B. The records of conveyances in the office of the County Clerk show a complete chain of title in A, except that there is no recorded conveyance from one of his predecessors in the title to another in the year 1870: This deed is in A's pos-

session. The deed was not acknowledged, the grantor and the witnesses are dead, and no one knows their signatures. How can he prove his title? Give your reasons.

## 179.

4. A entered into a contract in writing with B, wherein it was stated that A agreed to sell and convey to B certain timber lands therein described at an agreed price. B paid A the price, and A conveyed to B the requisite number of acres of land, but B thereafter discovered that the land conveyed to him had no timber upon it. Upon the trial of an action by B against A, upon the contract, for fraud, B attempted to prove that prior to the making of the contract, A stated to him that the lands he was to convey were heavily timbered, and pointed out to him heavily timbered lands which he said were like those he was to convey to B. The court excluded the evidence on the ground that the contract was the best evidence and could not be varied by oral evidence of acts and declarations prior thereto. Was the ruling right or wrong? State fully your reasons.

## 180.

5. A sues B to recover damages for injuries alleged to have been sustained by being struck by a wagon driven upon the sidewalk by one of B's servants. Upon the trial, A called C, who testified only that he drove B's horse and wagon on the occasion in question. B, as a part of his case, recalled C, who testified that he did not drive on the sidewalk. On cross-examination by A, C denied that at a certain time and place after the alleged accident, he had said to D that he did drive on the sidewalk. After B rested, A called D as a witness to prove what C denied saying on his cross-examination. B objected to the evidence. What was the ground of the objection, and what was the ruling of the Court? State fully with your reasons.

## 181.

6. In the perpetration of a fraud in the pretended sale and conveyance of lands, a notary public was induced to wilfully

certify falsely that the execution of a deed of conveyance of the land was acknowledged by the grantor named therein before him. Of what crime is the notary guilty?

182.

7. A prisoner, upon his arrest, made a confession to the officer having him in custody, admitting his guilt. This confession was made after the officer had told the prisoner that he could make him no promise, but that he would use his influence in his behalf if the prisoner should make any disclosures which would be of benefit to the government. The officer testified that he thought the statement was voluntarily made by the prisoner. Upon the trial of the prisoner the confession was proved against the objection of his counsel. The prisoner was convicted. Will the conviction stand? State fully with your reasons.

183.

8. A and B confederated to rob C, who had set his valise down on the sidewalk and was looking for a certain house on the street. A assaulted C with force and violence while B opened the valise without being observed by C, abstracted a watch and closed the valise so that it appeared to be in the same condition as before. C did not know of the loss until an hour later. Meantime A and B escaped. Later B is arrested, indicted and convicted of robbery. Counsel for B insists that B used no force or violence and is not guilty of the crime charged. Will the conviction be sustained upon appeal? State fully, with your reasons.

184.

9. The railroad train on which A was a passenger was thirty minutes late owing to a defect in the locomotive, which had existed and been known to the railroad company for two weeks. The train passed through a thunderstorm and the car wherein plaintiff sat was struck by lightning and he was severely injured. In an action of negligence brought by A against the railroad company to recover his damages, he successfully established that if the train had been on time,

it would have escaped the storm. What do you say about the liability of the company, and state your reasons.

185.

10. A, B and C were sued by D for a joint assault and battery against him. After issue joined, A paid D \$500 in satisfaction of his wrongful act, taking back a release and discontinuance of the action as against himself. At the trial, this being proven, counsel for B and C moved to dismiss the action against them. Motion denied and case went to the jury which gave a verdict for damages against B and C. Upon exceptions taken by them to the ruling of the court, B and C appealed from the judgment. Will the judgment be affirmed or not? State your reasons.

186.

11. A sues B to recover damages for a malicious assault and battery committed upon his person by B. On the trial, evidence is given on the part of the defendant to prove that, at the time of the assault, B was insane. The Court leaves the issue to the jury, and plaintiff's counsel requests the Court to charge that the defendant even if insane is liable for damages actually inflicted and is also liable for punitive damages, to both of which propositions defendant's counsel duly took exception. What do you say as to the correctness of the two propositions charged respectively?

187.

12. A had and left him surviving a son, B, and two daughters, C and D. Being the owner of two houses and lots and considerable personal property, which constituted his entire estate, he made his last will and testament whereby he devised unto each of the daughters a specified house and lot, and bequeathed the remainder of his property to his son, B. After making the will, the house and lot devised by the terms thereof to C were taken from A by the X Railroad Company in condemnation proceeding which were vigorously opposed by A, he receiving an award of \$10,000, which he immediately invested in the capital stock of the X Bank.

After his death, the stock was found in an envelope with the will and a memorandum signed by him, stating that it was his "wish and intention that the stock should go to C in place of the real estate for which it stood and represented and of which it was the avails." Under the will which was admitted to probate, how was the property distributed? State your reasons.

## 188.

13. A makes a will and leaves all his property, consisting exclusively of real estate, to his only child, X. He thereafter marries, has another child, and dies without changing his will, leaving his widow and his two children his only heirs at law him surviving. His will is offered for probate and objection is made thereto. What is the situation thereof and what disposition is made of his estate?

## 189.

14. The will of A provided that in case any legatee contested the will on any ground whatsoever, the legacies bequeathed to such contestants should be held revoked and be null and void, and the same should go into and form a part of his residuary estate, and be distributed accordingly. B and C, both being legatees, contested the will. C, being a minor, contested by his guardian appointed for that purpose. The will was admitted to probate, C still being a minor. Can B or C, or either of them, recover their legacies, or not? If so, for what reason, if not, why not?

## 190.

15. A was the owner of a vacant lot adjoining his family residence. He entered into a written contract of sale therefor to and with B, relying upon the representations by B that he was making the purchase for the purpose of erecting on the lot a residence for himself and family, and that the plans and specifications therefor were already made. B paid \$1,000 cash at the time, and the balance of the purchase price B was to pay on the last day of the following month, and on its receipt A was to execute and deliver the deed therefor. B immediately commenced grading the lot and

had expended \$500 therefor when the appointed time for payment of the balance of the purchase price and the delivery of the deed arrived. Meanwhile A had ascertained that the said representations by B were false, and that, at the time he and A made the contract, he, B, had already entered into a written contract with C for sale to him of the lot, conditioned on A's selling to B, whereon he, C, was to erect and maintain a livery stable, which would be offensive and detrimental to A. B duly demanded his deed at the appointed time, tendering the balance of the purchase price, which A refused to accept, or to give the deed. B sues for specific performance. A defends. Who wins? State your reasons, and the equitable maxim involved.

### 191.

16. A holds a mortgage upon three parcels of land. The owner sells one parcel to B, thereafter another to C and at the time of the foreclosure by A of the mortgage, he still owns a third parcel, which is insufficient to pay and satisfy the mortgage in full. In the foreclosure action, A makes B, C and the owner of the unsold part parties to the foreclosure. B consults you as to his rights. What are they, if any? What would you advise B to do under the circumstances for the protection of his property?

### 192.

17. A vessel is stranded at sea with imminent danger that unless it be, at once, relieved by lessening its cargo, not only the vessel, but the entire cargo would be lost or destroyed. In the emergency 500 tons of steel belonging to B were thrown overboard and lost, and thereby the vessel was relieved, and the vessel, as well as the balance of the cargo, which belonged to several different importers, was saved. A demurs to being made a sacrifice for others. Against whom, if any one, has he a remedy, and what, if any, is it? What equitable maxim applies?

### 193.

18. The board of directors of the X corporation consisted of three persons. It became necessary to pass at once,

a resolution authorizing the treasurer to execute a corporation note for a special purpose, which required corporate action, and its secretary drew up such a resolution and saw each director in turn, at his place of residence and had him assent in writing to the passage of the same — which was accordingly entered upon the minutes of the corporation as having been duly adopted by the board of directors. Question arises as to the validity of the note. What is your opinion? State your reasons.

194.

19. The X corporation was unable to pay its obligations as they became due in the regular course of business. At that time it was indebted to A, its president, on account of salary, in the sum of \$10,000, and it transferred to him, in payment of his claim, certain of its personal property of that value. Your client, a creditor of the company, which has no visible assets, consults you as to the validity of the transfer, and his rights in relation thereto, if any. What would be your advice?

195.

20. A foreign manufacturing corporation desires to do business in this State. Are there any limitations on that privilege? If so, what?

196.

21. In an action for an absolute divorce, complaint charges the wife with having committed adultery with A. A is innocent and consults you as to whether there is any method by which he can protect his reputation in the premises. What would be your advice?

197.

22. An infant sold his real estate to A, for its full and fair value and received the purchase price therefor, which he thereafter squandered. He repudiated the sale, when he became of age — and now brings an action against the vendee to recover the possession of the property, but he does not tender nor offer to restore the purchase price — for the

reason that he had spent it and therefore it is impossible for him to do so. Can he, under the circumstances, maintain his action? If so, why so; if not, why not?

198.

23. On December 15, 1899, a wife wilfully deserted her husband, and refused to live with him, and he gave notice to X, a tradesman, not to sell to her on his account. The wife on January 1, 1900, offered to return to the husband and he refused to receive her. X, with notice of the facts, sold goods to the wife from the day of her desertion to February 1, 1900, and now sues to hold the husband therefor. State the law governing the husband's liability, if any.

199.

24. The X Electric Railway Company is the owner of certain lands and premises in the City of A, which are necessary to the proper use and enjoyment of its franchise. The Y Steam Railroad Corporation finds that the said premises are absolutely essential to the proper use and enjoyment of its franchise—and desires to condemn the same for its corporate purposes, and asks your advice. What would be your advice?

200.

25. A committed the crime of grand larceny on January 1, 1900. At that time the Statute of Limitations for the prosecution of that offense was one year. In December, 1900, the Legislature made the time for finding indictments for grand larceny, two years, and in February, 1901, A was indicted, tried for the crime, found guilty, and sentenced to prison. What is your opinion as to the validity of the sentence? Give your reasons.

FIRST AND SECOND JUDICIAL DEPARTMENTS.

New York and Brooklyn, June 14, 1902.

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EXAMINATION PAPER.

Forenoon — Four Hours.

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201.

1. Jane Doe is an infant and is the owner of a promissory note made to her order by John Stiles. The note is past due, Draw a complaint upon the note in an action against the maker.

202.

2. You are retained to bring an action for libel against the publisher of a newspaper; you serve a verified complaint, but the attorney for the defendant serves on you an unverified answer. What will you do with it? State fully, with your reasons.

203.

3. A complaint in an action for negligence alleged that the defendant excavated a pit in a street and left the same unguarded, in consequence whereof the plaintiff, while passing along the street, fell into the pit and was injured. The answer contained three defenses, separately stated. (1) The contributory negligence of the plaintiff; (2) a settlement or compromise of the plaintiff's demands; (3) a denial of each and every other allegation in the complaint not before specifically admitted, qualified or denied. Upon the trial the plaintiff did not prove that the defendant made the excavation or that the same was in a public street, and the defendant moved for a dismissal of the complaint for that reason. What should be the ruling of the Court? State fully with your reasons.

204.

4. When is a reply necessary, and what is the effect of an omission to serve a reply when a reply is necessary?

205.

5. An injunction order has been granted *ex parte* unjustly restraining your client. You desire to have it vacated *ex parte*. What will you do? State fully.

206.

6. A Surrogate's Court, having cognizance of a certain matter, is about to exercise powers in excess of its jurisdiction, to the detriment of your client. How, and by what authority can you prevent it? State fully.

207.

7. A deed of conveyance of real estate situated in New York is executed and acknowledged in Boston, Mass. Draw a proper acknowledgment under the laws of New York and state what must be done to entitle the deed to be recorded in New York.

208.

8. A has taken a mortgage for \$5,000 upon B's farm to secure the payment of money loaned to him. A has neglected to record his mortgage until a judgment for \$1,000 has been obtained against the owner of the farm by C, and duly docketed in the office of the County Clerk. The farm is not worth more than the amount of the mortgage and A asks your advice as to his rights. What do you advise him? State fully.

209.

9. A farmer devised his farm to his son and daughter and their heirs to be held in joint tenancy. The son died intestate, leaving a son, A, and thereafter the daughter died intestate leaving two sons, B and C. B dies intestate leaving a daughter, D. Your client desires to purchase the farm. From whom can he obtain title? State fully, with your reasons.

## 210.

10. A met B and said to him: "I will give you \$5,000 cash for your stable and the horses therein contained, and here is \$1,000 to bind the bargain." B said, "I accept, and will give you a deed of the real estate and a bill of sale of the horses to-morrow at ten A. M." A replied, "All right; I will give you the balance of the money then." B took the \$1,000 and on the next day tendered the deed and bill of sale, as agreed; but A refused to complete his purchase and demanded the return of his \$1,000. B consults you. What are the rights of A and B, respectively? State your reasons.

## 211.

11. A and B became engaged to be married, A at the time being a married man, which fact was not known to B. B subsequently discovered the fact of A's marriage, and thereupon, without making any demand upon A, and he not having refused, sued him for breach of promise to marry. Can she maintain the action or not? State your reasons.

## 212.

12. A and B are copartners conducting a mercantile business. The sheriff receives an execution of \$500 against A and levies upon his interest in the goods of the firm. Two days after such levy the sheriff receives another execution of \$1,000 against A and B for a copartnership debt. The sheriff realizes on the sale of the copartnership stock levied upon, \$900, and he is now in doubt as to how the money should be applied. What would you advise him, and why?

## 213.

13. A was not a copartner in fact of B in a certain business, but held himself out to be such by his acts and declarations in order to give credit to B. C sold and delivered to B \$1,000 worth of goods for use in that business, but, at the time, he had no notice or knowledge of A's acts or declarations. C brings his action against A and B to recover for the goods sold, claiming that A is a partner because of

his said conduct and declarations. Will C recover judgment against A or not, and state the rule governing the transaction?

214

14. A sold to B the right to make, use and sell a certain invention claimed by A to be patented, for which B gave to A his note as follows:

" \$500.

NEW YORK, June 1, 1901.

"Six months after date, for value received, I promise to pay to A, or bearer, five hundred dollars, with interest, at the First National Bank of the City of Albany.

(Signed) B."

Before maturity A, without indorsement, transferred and delivered the note to C for value, who became the owner and holder in due course. The note was dishonored. What, if any, is A's liability for the transaction? State your reason.

215.

15. A being indebted to C and D, copartners, in the sum of \$1,000, gave to the firm his note for the amount, payable six months after its date. C and D immediately indorsed the note in and by their firm name, and discounted the same at the X Bank. Thereafter and before the maturity of the note C and D dissolved partnership. After such dissolution, which was known to the X Bank, the note was dishonored and notice thereof duly given to D, but not to C. X Bank sues both C and D as indorsers. C defends. Judgment for whom and on what grounds?

216.

16. A, as agent for and under the direction of B, employed C to reconstruct a coach belonging to B for a stated sum. C knew that A was acting as agent for some one in the transaction, but for whom A did not disclose, as he would readily have done had C inquired, and so was in ignorance of the name and identity of A's principal. When C had finished the work he called upon A for his pay. A disclaimed liability therefor and then disclosed B as his principal, for

whose benefit the work had been done, but C sued A to recover for his services, setting up the facts in his complaint, to which A demurred. Judgment for whom and why?

217.

17. A employed B, a real estate broker, to find a purchaser for his farm, the price and terms to be settled between A and the purchaser. C, wanting to purchase a farm, had also employed B to find for him, C, a farm, the price and terms therefor to be fixed and agreed upon between C and the seller. Each party, without knowledge thereof by the other, agreed to pay A a commission. B brought A and C together, and they personally negotiated with each other and concluded the sale of A's farm to C. At the conclusion of the sale A and C first learned that B had been acting for both of them under an agreement from each to pay him a commission, and both A and C then refused to pay B the commission to which they had respectively agreed. B consults you as to his rights in the case. What advice do you give him, and for what reason?

218.

18. A owed B \$10,000 for goods sold and delivered. B had in his possession, as collateral security for the debt, securities, the property of A, to the value of \$10,000. A was unable to pay the debt, and, desiring more time, as well as the privilege of disposing of the collateral, he induced C to become his surety for the debt, and thereupon B surrendered the collateral to A. C knew nothing about the collateral and became surety regardless of the fact. When the debt became due A was insolvent and B demanded of C that he pay the same. C then, for the first time, learned about the collateral and consults you as to his rights, if any, in the premises. What would be your advice?

219.

19. A was surety to B for a debt of \$10,000 due to B from C. The debt was not paid at maturity and A, on demand of B for its payment, extinguished the same by the

payment of one-half of its amount to B. The surety now sues C for \$10,000, the amount of the original debt. What would be your advice to C under the circumstances?

220.

20. A took out a policy of insurance on his life in the sum of \$10,000, payable on his death to B, an old college friend, who was not related to him, and who had no insurable interest in his life. When A died the company refused to pay the policy, claiming that it was void originally as a wager policy, but offered to return to A's estate all the premiums paid, with interest. B consults you. What would be your advice?

221.

21. A policy of fire insurance on B's dwelling-house provided "that this entire policy, \* \* \* shall be void \* \* \* if any change take place in the title or possession of the subject of insurance." While the policy was in force B executed and delivered to C a deed of the property, absolute in form, but, in fact, given as security for a debt. B remained in possession, but while the deed being on record was outstanding a fire took place and the premises were damaged in the amount of the policy. The company refuses to pay because of the deed and B consults you. What would be your advice?

222.

22. A delivered to B, a miller, 10,000 bushels of wheat, to be ground, the latter to return to A therefrom 2,000 barrels of flour, the balance, if any, to be retained by the miller for his services. While the wheat was in the possession of the miller it was levied upon by the sheriff under an execution issued on a judgment recovered against him. A then consults you about getting his wheat back. What is the nature of the transaction, and what would be your advice?

223.

23. A warehouseman received the goods of A on storage for hire and delivered to him a receipt therefor, which ex-

empted him from liability for loss or damage thereto by fire. Subsequently the goods were destroyed by fire while in the warehouse and A sued the warehouseman for their value. Can A, under any circumstances, maintain his action? If so, what must he establish; if not, why not?

224.

24. A sold to B 5,000 watch cases warranted to be like sample exhibited, at the agreed price of five dollars each. The goods were in existence and were delivered on the day specified therefor. The watch cases were not equal to the sample, a fact which B determined at once, upon inspection. B retained the goods, and neither returned nor offered to return the same, and subsequently sold them, in due course of business, for their actual value, by reason of which he lost \$5,000 on the transaction. B is now sued for the contract price of the goods and consults you as to his right to offset against the claim, his damages as hereinbefore set forth. What would be your advice?

225.

25. A, by a valid contract in writing, made and executed on January 2, 1901, sold to B 10,000 tons of coal, at the agreed price and value of five dollars per ton, the same to be delivered to B at his warehouse in the city of X on December 1, 1901. On February 1, 1901, B met A and said: "I've changed my mind about that 10,000 tons of coal, you need not deliver it." A consults you. If B will not accept the coal, he does not want to tender it because of its bulk, nor does he desire to wait until December first to know B's final action. What would be your advice, and what can A do under the circumstances?

FIRST AND SECOND JUDICIAL DEPARTMENTS.

New York and Brooklyn, June 14, 1902.

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EXAMINATION PAPER.

Afternoon — Four Hours.

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226.

1. Upon the trial of an action for conversion against A and B as joint tort-feasors, the plaintiff gave no direct proof against either of the defendants, except the admissions of A, which were admitted against objection and clearly showed that both A and B had jointly committed the tort act. A verdict was rendered against A and B. What should be the result of an appeal? Give your reasons.

227.

2. On the trial of an indictment for felony against an infant, the prosecution proved the act and rested. The defense then proved that the accused was ten years old and rested. No other evidence was given. The attorney for the prisoner then moved for a direction to acquit, and the prosecution asked that the case be sent to the jury. What should be the decision of the Court, and why?

228.

3. A brings an action against B to recover damages inflicted by B on C, his wife, which caused her death. Upon the trial A was asked to state a conversation between him and C, which occurred just before her death, to the effect that it was B who inflicted the injuries. This was objected to by counsel for B. No other proof against B could be procured. What was the ruling of the Court and why? State fully, with your reasons.

## 229.

4. In preparing a case for trial, as counsel for the plaintiff, you have interviewed a man who is cognizant of certain facts in the case. He has stated to you that he saw the defendant sign a certain paper, which fact you desire to prove. Upon the trial you call him as your witness, ask him if he saw the defendant sign the paper in question, and he answers: "No, I did not see the defendant sign it; I saw A sign it in the defendant's name." You thereupon interrogate the witness in respect to his previous declarations. Counsel for the defendant objects, upon the ground that you are cross-examining and impeaching your own witness. Should objection be overruled or sustained? Give your reasons.

## 230.

5. A, the publisher of a newspaper, is defendant in an action for libel brought by B upon a statement published in A's newspaper to the effect that B is threatened by suit for breach of promise by a young lady prominent in society circles and that B and his friends are attempting to bring about a reconciliation, but the young lady insists on B marrying her. The complaint did not aver special damages. On the trial B offered to prove that at the time of the publication by A he was a married man. This was objected to by the defendant; the objection was overruled and the evidence was admitted over the defendant's exception. Was the exception well taken? Give your reasons.

## 231.

6. You have been assigned by the Court to defend a prisoner indicted for manslaughter, and you are preparing for trial. Your client has no money. You cause an important witness to be subpoenaed, but he refuses to attend the trial, unless he is paid witness fees. How can you secure the attendance of the witness? State fully.

## 232.

7. A is driving along a country road and overtakes B, a stranger, who is on foot, and invites him to ride. B accepts

the invitation and deftly picks A's pocket of his purse containing \$100 without A's knowledge. A discovers his loss, accuses B of taking it and demands its return. B leaps out of the wagon and tries to escape, but A follows him, and B, in order to retain possession of the stolen property, draws a revolver and intimidates A and makes good his escape. What is the highest degree of crime with which B can be charged? Give your reasons.

**233.**

8. Upon the trial of a prisoner for burglary the evidence produced by the prosecution and defense was conflicting. The Court charged the jury that they must carefully weigh the testimony submitted in favor of the people and the defendant and determine the question of the guilt or innocence of the prisoner upon the preponderance of evidence. Counsel for the prisoner excepted to the charge. The prisoner was convicted. State whether or not the charge was erroneous. Give your reasons.

**234.**

9. A conductor on the X Railroad, while in charge of the train, detained by force a passenger and refused to allow him to alight at his station because he believed him to be Y, a notorious criminal, for whose arrest the State had offered a large reward. The passenger, who was not Y, was subsequently identified as a reputable citizen by several other passengers and finally set at liberty by the conductor. The passenger brought an action against the railroad company for damages for his arrest and detention, and the question arises as to the liability of the company. State your opinion and the reasons therefor.

**235.**

10. A feloniously stole B's horse and was thereafter sued by B in an action to recover its value. A did not defend and B obtained judgment by default. Execution was issued on the judgment, which was returned unsatisfied. In the meantime A presented the horse as a gift to C, who knew all the facts concerning A's title. B now brings an action in replevin against C to obtain possession of the horse. If A had de-

fended, could he have prevented judgment, and has C any defense to the action in replevin? State your reasons.

**236.**

11. A brings an action against B, setting forth in his complaint all the necessary allegations constituting his liability to X for malicious prosecution, and then an allegation of the assignment by X of that cause of action to A, the plaintiff. B interposes a demurrer to A's complaint as not stating facts sufficient to constitute a cause of action. Judgment for whom, and on what ground do you base your answer?

**237.**

12. A devised and bequeathed his entire estate both real and personal, each of the value of \$50,000, to the X Asylum, a benevolent and missionary society organized under the act of 1848 (chap. 319, Laws 1848). His will was made on January 3, 1902, and he died on February 4, 1902, leaving no wife, child or parent him surviving; his only heir-at-law and next of kin being a sister. Question arises as to the validity of the will. What do you say. Give your reasons.

**238.**

13. A makes a will and by it bequeaths his entire estate, consisting of \$30,000 in government bonds, in the manner following:

Five thousand dollars to his only child, X, and the remainder to his wife. Thereafter he has another child born unto him and dies without changing his will, leaving his two children and his wife his sole heirs at law him surviving. What is the effect of his death and how will his estate be divided?

**239.**

14. A, who was but twenty years of age, made her last will and testament whereby she bequeathed all her personal property, amounting to \$10,000, to B, and devised her real estate, it being of the same value, to C, both being her brothers. She left her surviving a husband, to whom a child was born alive,

issue of her marriage, also a father, beside her two brothers. Her mother and the child were dead and she left no living descendants. The real estate did not come to A on the part of her mother. What do you say as to the will being valid or not? If the will is probated, how will the property be divided or descend?

#### 240.

15. A and B entered into a written contract whereby A sold and was to convey to B a valuable house and lot on the following day, when B was to pay the purchase price and take his deed from A, and the contract was to be completed. That night, without the fault of A or B, the house, which was nine-tenths of the value of the property, burned and was totally destroyed. In whom was the equitable title at the time of the fire, and upon whom does the loss fall, and for what reasons? What equitable maxim applies?

#### 241.

16. A and B sold and conveyed to C certain real property for \$12,000. One-half the purchase price was paid down, and for the other one-half C made separate mortgages to A and B for \$3,000 each. The two mortgages were recorded at the same time, but it was orally agreed between A and B at the time of the transaction, in consideration of A's accepting the mortgage, that his mortgage should have preference over B's. Subsequently B assigned his mortgage to X, who paid full value therefor and took the mortgage in good faith, believing the two mortgages to be equal and concurrent liens on the property. In an action by A to foreclose his mortgage he made X a party defendant, claiming that X was a subsequent lienor. X defends, insisting that the mortgages are equal and concurrent liens. How will it be decided? Give your reasons.

#### 242.

17. A, who has a valid claim against B, consults you in regard to collecting it. You investigate and find that B is insolvent, having just transferred a valuable house and lot to

his wife without consideration. What course of legal procedure would you follow to collect the debt? State fully, giving each step of your proceeding in its proper order.

**243.**

18. The annual meeting of the X corporation is required by its by-laws to be held on October tenth in each year, at which time a board of directors is to be elected. It failed to meet during the years 1899, 1900 and 1901, and the board of directors elected in 1898 is still acting. What is your opinion of the situation in so far as it concerns the validity of the acts of the board of directors since October 10, 1899? Give your reasons.

**244.**

19. A was in the employ of the X corporation under a contract of service for one year from January 1, 1900, at the annual salary of \$1,200, payable monthly. On the 1st day of July, 1900, the X corporation consolidated with another corporation, known as the Z corporation, and became merged therein, and A was thrown out of employment. On January 1, 1901, A began an action against the X corporation to recover for the six months' salary due and unpaid on his contract. Can he maintain the action? If so, why so? If not, why not?

**245.**

20. Your client is a judgment creditor of a stock corporation and desires to bring an action against the stockholders of record on a certain day to enforce his judgment. He does not know who the stockholders are and asks your advice as to how to obtain the names thereof. What do you say?

**246.**

21. A husband procured from his wife a written confession of her adultery with X and asks you to bring an action for divorce predicated thereon. He has no other evidence. What would be your advice to him?

247.

22. An infant contracted with A to work for him for one year at the agreed wages of fifty dollars per month, payable at the end of the term. He worked for six months and quit without cause. His guardian now sues A for \$600, being for the six months' work, at \$100 per month. A consults you. What are the rights of A and the infant under the circumstances disclosed?

248.

23. X, an invalid, boarded with A, who maintained the house. A's wife, while attending to the household duties and engaged in no other occupation, nursed A, with the knowledge and consent of her husband. The services rendered by her were reasonably worth \$500, for which sum the husband brought suit, the wife making no claim therefor. Question arises as to whom did the claim belong under the circumstances, to the wife or to the husband? What do you say? Give your reasons.

249.

24. The Legislature passed a law entitled "An Act to Provide for an Electric Light System in the Village of X." The act consisted of fifteen sections, fourteen of which related to the establishment of the electric light system. Section fifteen thereof read as follows: "Sec. 15. The office of overseer of the poor of the village of X is hereby abolished." The overseer had but served one year of a three-year term. He now consults you as to the right of the Legislature to abolish his office during his term and as to the legal effect of the above act. What do you say? Give your reasons.

250.

25. An assessment for a local improvement was levied upon the property of A and proceedings were taken to sell the same, because of the non-payment thereof. The act of the Legislature under which the assessment was made provided as a condition to its validity that the advertisement for bids to do the work should be published twice a week, for three

weeks, in three newspapers published in the town where the property was situated. On investigation it was found that the advertisement had been published in but one newspaper, and then only once, and that a subsequent Legislature had passed a law confirming, validating and relevying the assessment as made, notwithstanding the fact that the bids had not been advertised for as required by the original act. Your opinion is asked as to the validity of that law. Give your reasons.

FOR THE STATE OF NEW YORK.

New York and Syracuse, October 14, 1902.

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EXAMINATION PAPER.

Forenoon — Four Hours.

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251.

1. Your client is sued for goods sold and delivered. He brings you the complaint and a receipted bill for the account therein set forth. Draw an answer, without verification.

252.

2. The bids to do and perform a public contract have been opened. The statute requires that the same be let to the lowest responsible bidder. A, who is a bidder, fulfils all the requirements, yet the public board, whose duty it is to award the contract, neglects to do so. A, who wants a speedy determination, consults you. What proceeding could you take under the circumstances, and narrate the procedure thereof.

253.

3. An unincorporated political club in your district, with 300 duly elected members and a full set of officers, is indebted to your client for the rent of the building in which it meets. It owes the money and has club property. How, and against whom, can you maintain an action to recover the rent?

254.

4. Two executions against the property of X, a judgment debtor, were issued out of a court of record, and delivered to the sheriff of the county where X lived, for collection. One was in favor of A, for \$1,000, and was delivered to the sheriff for execution, on January 2, and the other in favor of B, for

\$1,000, was delivered on January 3. The sheriff made no levy under A's execution, but did under B's, and sold thereunder personal property of the judgment debtor, to the amount and value of \$1,000. Both executions still being in the sheriff's hands, A claims the proceeds of the sale. State the rule governing the transaction.

255.

5. A sued B in tort, for the wrongful conversion of certain goods. The case was tried and it was adjudged therein that there was a *bona fide* sale of the goods in question, and judgment was rendered in the action for the defendant, on the merits. Can A now sue B to recover the value of the goods? If so, why so; if not, why not?

256.

6. In an action on contract, the complaint on the face thereof, showed that the action had been commenced more than six years after the cause of action had accrued. Is it necessary that defendant, under the circumstances, should plead the statute in order to avail himself thereof? State your reasons for your answer.

257.

7. A tenant, under a lease which expired on April 1, 1902, in 1901 planted a crop of winter wheat, which could not be harvested until after April 1, 1902. In 1902, subsequent to April first, the landlord, who was then in possession, harvested the crop, which was worth \$1,000. He claims its entire ownership, as against the former tenant. The seed planted by the latter was worth \$250. State the rule of law governing the transaction, and to whom does the wheat belong.

258.

8. A executed a deed, in and by which, he granted an estate for life to B, and then an estate for life to C, to take effect upon the death of B, and then successive life estates to D, E and F, respectively, then the fee to G. Give your opinion as to the effect and validity of the deed.

## 259.

9. A, being about to purchase an estate from B, caused careful search to be made of the records and found that there was no claim, lien, or incumbrance thereon, on record. A few minutes before he closed the transaction, C, who had no interest and no authority in the premises, volunteered the information to A that D had and held an unrecorded mortgage on the property of \$10,000. A did not believe C, and relying upon the record, completed his purchase, and paid the full cash value of the property therefor, and put his deed on record. D did hold the mortgage, as above set forth, which is still unrecorded. What are the rights of A and D under the circumstances?

## 260.

10. The Z Railroad Company received from A several packages of machinery for transportation and delivery to B in Boston, and it issued to A a bill of lading which contained the provision that the packages were to be transported at the "owner's risk." A portion of the machinery was lost in transit and A brought an action against the railroad company to recover the value thereof, alleging negligence. Upon the trial the plaintiff conclusively proved the negligence of the defendant, but counsel for the defendant railroad company insisted that A could not recover because of the condition contained in the bill of lading. Who wins? Why? Give your reasons.

## 261.

11. On July first, A, B & Co., brokers, doing business in New York city, wrote to C, at Boston, Mass., offering to sell him 100 shares of the capital stock of the X Co., at 90, if the offer should be accepted within five days. The letter was received by C, July second, and the following day he wrote A, B & Co., accepting their offer and directing that the certificate be delivered at the office of his banker in New York, where payment therefor would be made. This letter was duly mailed, but was never received. Meantime the price of the stock rose to 150. C tendered to A, B & Co., \$9,000 and demanded the stock. A, B & Co. replied that not hearing from

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C, they had sold the stock to another party at a higher price. C brings an action against A, B & Co. to recover damages for breach of contract. Can he recover? State fully, with your reasons.

**262.**

12. A, B & C were copartners, under an agreement wherein it was stipulated that the partnership should terminate December 31, 1900. The copartnership occupied premises upon which it made valuable improvements and by the joint efforts of the members thereof, built up a valuable good will and increased the rental value of the real estate. During the year 1900, without the knowledge of his copartners, A took a renewal lease in his own name, for his own benefit, of the premises occupied by the firm, to take effect January 1, 1901. B and C consult you as to their rights and remedies under the circumstances. What would be your advice? Give your reasons.

**263.**

13. C loaned to the firm of A & B, \$5,000, to be used in the firm business for one year under an agreement that C was to receive one-third of the profits of the firm during that time, and at the end of the year, if he did not then decide to become a partner, he was to be repaid his \$5,000. Before the expiration of the year the firm became insolvent and a creditor of the firm brings an action against A, B and C, as copartners, claiming, by reason of the facts stated, that C is a copartner or member of the firm. C defends. On what probable ground? Judgment for whom, and why? State your reasons.

**264.**

14. A made his promissory note, for value, to B, who before maturity, and for value, indorsed the note to C. A short time before the note became due, B, fearing that A would not pay the note, induced A to assign all his property to him for his protection. When the note became due, it was not paid by A, and C, who was still the holder thereof, forgot to give notice to B, as indorser, of presentation and non-pay-

ment. C brings suit against B, upon his indorsement, and B defends on the ground that he did not receive notice of presentment and non-payment. Who wins, and why?

265.

15. A duly made and delivered his promissory note to B, who indorsed the same for value to C, before maturity. The day before the note was due, A gave C his check on the X Bank for the amount of the note, asking him to send the note to him by mail. C had the check certified by the cashier of the X Bank, but did not collect it. The same day, both A and the X Bank became insolvent. The following day, the day of the maturity of the note, C caused notice of protest to be given to B as indorser. C brings an action against B, who defends. Who wins, and why? Give your reasons.

266.

16. A was employed by B to purchase for him certain real estate to be sold at public auction. A attended the sale, bid off the property in his own name, and paid ten per cent. of the purchase money in accordance with the terms of sale, without disclosing to either the owner of the real estate or the auctioneer that he was acting in the character of agent for B. Before the payment of the remainder of the purchase money became due, B became insolvent. The owner of the property demanded payment of A, which was refused. Suit is brought against A to recover the amount remaining unpaid and he defends on the ground that in making the purchase he was acting as B's agent. Is his defense good? State fully, with your reasons.

267.

17. A was the owner of a promissory note made by B, payable to the order of A. Upon the maturity of the note, A handed it, without indorsement, to C, with directions to collect the interest due and obtain from B a new note with an indorser. C obtained from B the whole amount due upon

the note in cash, principal and interest, surrendered the note to B, paid the interest to A, and absconded with the principal. A sues B for the principal. Can he recover? State your reasons.

## 268.

18. John Doe was elected cashier of the X Bank and before assuming office was required to give a bond to the bank for the faithful performance of his duties as cashier in the sum of \$50,000. He requested Richard Roe to become surety upon his bond but Roe refused unless John Stiles would first sign the bond as surety. Subsequently Doe presented the bond to Roe purporting to bear the signature of Stiles as surety, and requested Roe to sign as cosurety, with which request Roe complied. Doe defaulted as cashier and the X Bank brought suit against Doe, Roe and Stiles on the bond. Doe made no defense. Roe defended on the ground that he signed the bond relying upon the genuineness of Stiles' signature, knowing him to be solvent; that the signature of Stiles was forged and therefore he was not liable. Upon demurrer to Roe's answer, what should be the decision of the Court? Give your reasons.

## 269.

19. A leased to B a store, for five years, at an annual rental of \$1,000, the lease providing that by giving written notice thirty days before the expiration of said term, B could, at his option, continue his use and occupancy of the store for five years longer at the same rental. C, by indorsement on the lease, "for value received, guaranteed the payment of the rent stipulated in within lease." B paid his rent for the stated term of five years, gave due notice, and continued under his option to use and occupy the store. He defaulted in payment of the rent at the end of the first year of the extended term. A makes claim against C, under his guaranty, for \$1,000 rent. C insists that his liability, as surety, ended with the expiration of the stated term of five years and that he is not liable. Who is right and why?

## 270.

20. A insured his residence and its contents in the X Company, for the sum of \$8,000. The house was set on fire, and, with the contents, was totally destroyed by the wrongful and criminal act of B, who was amply responsible to respond for the amount of damages caused. The actual value of the property destroyed was \$10,000. Upon B being accused by A, he confessed, and immediately paid A \$10,000, his entire loss, and the latter gave him a release of all damages sustained. Thereafter A, having duly made and delivered proofs of loss, brought action on his policy against the X Company to recover \$8,000, the amount of his insurance. The X Company defends. Judgment for whom, and why, and what principle is involved?

## 271.

21. A authorized B to receive and receipt for \$20,000 government bonds belonging to him at Los Angeles, California, and bring and deliver the same to him at New York city, which B agreed and undertook to do. Whereupon A procured for his own benefit, as beneficiary, an insurance on the life of B, for the sum of \$20,000, for the term of one year, loss, if any, payable to him, A. One month thereafter, while B was then enroute with the bonds, under his agreement, he was accidentally killed in a railroad wreck, the bonds, however, were secured and duly turned over to A, who suffered nothing by the accident. The X Company offers to restore to A the premium paid, but refuses to pay the policy. Proofs of death have been duly made and served, and A sues the X Company to recover amount of policy. The X Company defends. On what probable ground? Who wins, and for what reason?

## 272.

22. A delivered to B's mill, 100 pine logs, under an agreement that B should saw the same into boards within three months, and that each party should have half the boards. When B had sawed fifty of the logs, he sold the boards

therefrom to C, intending to turn over the boards from the remaining fifty logs when sawed (which were equal, in size and quality, to those already sawed) to A, as his half under the agreement. A immediately sued B in conversion for the value of the boards sold. What was the legal relation of A and B in and to the boards sold, and who will win in the action, and for what reason?

## 273.

23. A procured from B, a livery man, for hire, a horse and carriage, representing that he was to drive only to the village of C and return. A drove to C, and then twelve miles beyond, to the village of D, where the horse was killed by a runaway team colliding with it. B sued A for the value of the horse, setting up only the foregoing facts in his complaint. A answers, admitting the allegations of the complaint, and then sets up affirmatively that he exercised ordinary care in the use of the horse, and that its death was not caused or contributed to by his misuse or negligence. B demurred to the affirmative answer. Judgment for whom? Give your reasons, and state the relation of A and B in the transaction.

## 274.

24. A sold and delivered a horse to B for which the latter was to pay one month thereafter \$500, on the condition that B might, at his option, after using the horse ten days, then immediately return it if it was not satisfactory. On the ninth day thereafter (B having in good faith made up his mind to return the horse the next day), C levied upon and afterward sold the horse on execution against B. To whom shall A look for his \$500? State your reasons.

## 275.

25. A negotiated with a jeweler for the purchase of a gold watch, price \$300, which was satisfactory, but wanted six months' time in which to pay, to which the jeweler assented, and it was agreed that A should give his note, without an indorser, for \$300, with interest, at six months,



BAR EXAMINATIONS AND COURSES OF STUDY.

therefor. The jeweler delivered the watch and requested of A, his note, when A replied, "It has just occurred to me that I have bound myself with my partner not to give notes and I cannot do it." A declined to give the note, but offered the jeweler a diamond stud of the value of \$500 as security, which the latter refused to accept, and immediately sued A for \$300, the purchase price of the watch. A defends, claiming that the debt is not due, that he purchased on six months' credit. A is amply responsible and was known so to be by the jeweler at the time of the sale. Judgment for whom, and why?

FOR THE STATE OF NEW YORK.

New York and Syracuse, October 14, 1902.

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EXAMINATION PAPER.

Afternoon — Four Hours.

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276.

1. On the trial of an action against a railroad company for damages for negligently causing the death of a person, the question was as to the absence or presence of the flagman from his post of duty at the time of the accident. A witness for plaintiff, who was present just after the accident, was asked to testify as to what he heard the by-standers, who saw the accident, say in the absence of the flagman, concerning his being present when the accident occurred. Objection is made to the testimony. What should the ruling of the Court be, and why?

277.

2. A, who was shot by B, was brought immediately thereafter to a hospital for treatment. His attending physician knew that A was about to die and had him make and sign the following declaration and swear to it before a notary public: "I, A, on the 3d day of January, 1902, was shot and wounded by B," declaring, in addition, the circumstances surrounding the transaction. Within an hour thereafter he died of the wound mentioned in the declaration as having been inflicted by B. B was subsequently indicted for the murder of A, and on his trial the declaration was offered in evidence by the prosecution. Objection was made thereto. What should the ruling of the court be, and why?

278.

3. A merchant claimed to have sold to a customer 100 barrels of flour, and that the same were delivered by X, a

cartman. The customer denied the delivery and stated "if X will say that he delivered the goods, I will pay for them." X stated that he had delivered the same, but the customer still refused to pay. On the trial of an action for the goods question arises as to the admissibility and effect of the cartman's statement. Is it, or is it not, admissible? State the rule and the effect, if any, of the cartman's statement on the liability of the merchant.

279.

4. You wish to prove on the trial of an action the items of an account for work done and materials furnished. Your client, the plaintiff, has no present recollection of the items, but has a memorandum of the transaction. What must you show to prove the items?

280.

5. On the trial of an action for damages for slander in stating generally that the plaintiff was a thief, the defendant offered testimony in mitigation of damages to show that on or about the day he uttered the words charged the plaintiff actually stole defendant's horse. Objection was made. What should the ruling of the Court be, and why?

281.

6. On the trial of your client for murder you wish to qualify as a juror, a talesman, who, in response to a question from the District Attorney, has testified that he has a present impression or opinion as to the guilt or innocence of the defendant. Can you do so? If so, how; if not, why not?

282.

7. A, under circumstances from which a jury could correctly infer an intent to shoot off and discharge the pistol, pointed a loaded pistol at B, who was within shooting distance. Before he shot or did anything further he was disarmed. Of what crime was he guilty, if any, and why?

283.

8. A was indicted and tried for the crime of robbery, in that being armed with a dangerous weapon, he unlawfully

took from the person of B, against his will, by means of force, violence and fear, the sum of \$500. The jury found him guilty of larceny from the person. Will the verdict stand? If so, why so; if not, why not?

## 284.

9. A railroad train was derailed, resulting in the injury of a trespasser on the private land of the railroad company. You are asked to advise the railroad company as to the degree or extent of care which it owed to the person injured. What is your advice? State fully, with your reasons.

## 285.

10. An infant of the age of seven years was injured by a railroad locomotive at a highway crossing. Upon the trial of an action against the railroad company to recover damages for the injuries sustained by the child it became necessary to determine whether or not the child was *sui juris*. How was the question determined, and upon what did it depend? State fully, with your reasons.

## 286.

11. A was the owner of a valuable horse which escaped from the paddock and for which A made search in vain. Subsequently the horse was taken up in the highway by a farmer. B, learning the facts, went to A, and, concealing from him his knowledge that the horse had been found, offered A twenty-five dollars for the horse, being less than ten per cent. of its value, which A accepted and gave to B a bill of sale of the same. B exhibited the bill of sale to the farmer and demanded and obtained possession of the horse. Upon learning the facts A brings an action against B to recover the value of the horse, less the amount received by him from B, on the ground that the sale had been procured by fraud. Can he recover? Answer fully, with your reasons.

## 287.

12. A testator in and by his last will directed his executor to turn all of his real and personal estate into cash and to

divide the proceeds thereof equally among his wife and children, share and share alike. There is \$100,000 in real estate and but \$10,000 in personalty. The widow claims dower in the real estate in addition to her distributive share. State your opinion, with your reasons.

288.

13. A made his will devising certain lands to the children of his son, George, and of his daughter, Susan, to be divided among them, share and share alike, as they severally become twenty-one years of age. George and Susan each have, two children born before the death of A and one child born after his death. What are the rights under the will of the several grandchildren? Give your reasons.

289.

14. A died leaving a will whereby his son, B, was cut off from all share in his estate. B contested the probate of the will, but was defeated and the will was admitted to probate. Upon appeal by him to the Appellate Division and to the Court of Appeals the probate was sustained. One year after the will was admitted to probate, B consults you and asks what further or other remedy, if any, he has, and how it can be applied? What do you advise? State fully.

290.

15. A instructed X & Co., his stock brokers, to sell certain shares of stock whenever the market price thereof should reach \$150 per share. That price was reached in the market, and the following day A called on X & Co., and inquired if they had sold his shares. X & Co. stated that they had not sold, as the market looked strong and they thought the stock would reach a higher price. A said nothing and went away. A few days later the market price of the stock began to decline and X & Co. sold the shares at \$125 per share. A sues X & Co. for the loss arising from the subsequent depreciation in the price of the stock. Can he recover? Answer fully, stating your reasons.

291.

16. A purchases certificates representing an interest in an illegal trust. The certificates contain a stipulation binding their holder to all the terms of the agreement on which the trust was formed. A begins an action in equity to secure, through an accounting and distribution, profits and assets alleged to have been acquired by the trust under the agreement by which it was formed. Is A entitled to the relief asked for? If so, why; if not, why not? State fully, giving your reasons.

292.

17. A person who was injured in a railroad accident settled with the railroad company, received a sum of money and gave a release of all claims and demands against the company. He believes that he has been overreached by the attorney of the railroad company in making the settlement and asks you to advise him what steps he must take to put himself in a position to obtain adequate compensation, and what remedy he has, if any. What is your advice? What equitable maxim is involved? Answer fully, with your reasons.

293.

18. A corporation authorized by its charter to engage in the telegraph and telephone business only, entered into a written contract with the city of Albany to manufacture electricity for, and to furnish electric lights for lighting the city, its streets, etc., for the term of five years, to commence six months thereafter. Two months thereafter the corporation repudiated the contract and notified the city that it should not perform. What, if any, remedy has the city against the corporation for its breach of contract, and why?

294.

19. The directors named in the charter for the first year of the X corporation, who held over and continued as directors, because of their neglect and refusal to adopt by-laws enabling the stockholders to hold an annual election for directors after the expiration of the first year, voted to and

did employ A as the corporation's attorney for the ensuing year, at a salary of \$3,000. A acted as such attorney for the year, when a new board was elected, which dispensed with his services and refused to pay him anything for his said services rendered. He sues the corporation for \$3,000. Will he recover? If so, why; if not, why not?

295.

20. The X Street Surface Railway Company had obtained the requisite consent of the municipal authorities of the city of Rochester to construct and operate its railway in West Main street of that city, but was unable to obtain the necessary consents of the abutting property-owners therefor. How, if at all, can the X Company acquire the legal right to construct and operate its road in that street?

296.

21. A husband furnished to his wife fifty dollars weekly to pay the running expenses of their home. The wife by her economy, without the husband's knowledge, during the year saved and accumulated therefrom \$700, with which she purchased in her own name a horse, carriage and harness. While the same were being delivered to their house, the wife having paid for the same as aforesaid, the sheriff levied upon and subsequently sold the whole outfit on an execution against her husband, all of which she forbade. The wife consults you as to her rights. What would you advise, and for what reason?

297.

22. A, the husband, and B, the wife, were owners of real estate, as tenants by the entirety. A procured a divorce, *a vinculo*, from B and then married C, and had a son, D, issue of the latter marriage. Then A dies intestate, leaving B, C and D him surviving. What are the respective interests of said survivors in the real estate, and how, if at all, were the interests of A and B in the real estate affected by the divorce?

298.

23. In the trial of a joint action against husband and wife for an assault upon B, the court charged the jury as follows, to wit: "The wife is liable for her wrongful and tortious acts in this case; the husband is not responsible for her acts, unless they were committed by his coercion or instigation, but it is presumed, as matter of law, where the husband is present with his wife, and, seeing, fails to restrain or makes no attempt to restrain her from the commission of such acts, that he not only consents thereto, but he instigates her to such commission and is liable therefor." State whether the charge is correct or not. Give your reasons for your answer.

299.

24. The X State Banking Association becoming insolvent, it was ascertained that it had outstanding and in circulation \$100,000 of its duly-issued bills and other general indebtedness of like amount. Its assets, after being reduced to cash, amounted to only \$100,000. The question arises how shall the assets be applied on the obligations of the bank. State your reasons. (Assume that there is no Bankruptcy Law.)

300.

25. The defendant was regularly tried on an indictment for burglary. Evidence for and against was given. The jury acquitted. The presiding judge set the verdict aside as against the weight of evidence, as it clearly was, and ordered a new trial. The defendant appeals. With what result, and for what reason?

**FIRST AND SECOND JUDICIAL DEPARTMENTS.**

**New York City (Borough of Manhattan), April 19, 1905.**

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**EXAMINATION PAPER.**

**Forenoon — Four Hours.**

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**301.**

1. A asks you to commence, by the service of a copy of the summons only, an action against B to recover a penalty given by statute. Draw a summons in the action to serve upon the defendant.

**302.**

2. The copartnership between A and B was dissolved by mutual consent. At the time of the dissolution, the firm was indebted to X in the sum of \$1,000. X thereafter executed a release of the indebtedness to A, which release exonerated him from all liability incurred by reason of his connection with the partnership. Then X sued B for the full amount of the claim. Has B, by reason of the above facts, any defense to the cause of action or any part thereof? Give your reasons.

**303.**

3. A and B are each merchants doing a separate business in the city of New York. They dealt with each other between January 1, 1895, and January 1, 1899. Each kept an account of his transactions with the other, which accounts were mutual, open and current. On January 1, 1899, the date of the last item in A's account, there was a balance due on the account from B to A of \$1,000. A began an action therefor on January 1, 1904. B pleads the statute of limitations as a defense to all items prior to January 1, 1898, which, if allowed, will reduce A's claim to \$40. Is B's plea good or otherwise? Give your reasons.

304.

4. You procure, as attorney for the plaintiff, an order directing the service of a summons upon a non-resident defendant without the State, by publication in two newspapers for not less than once a week for six successive weeks, or, at the option of the plaintiff, by service of the summons and a copy of the complaint and order without the State, upon the defendant personally.

You exercise the last option. When will the defendant so served be in default for failure to appear or answer?

305.

5. The complaint in an action by a corporation alleges "that the plaintiff is a domestic corporation duly organized and existing under and by virtue of the laws of the State of New York." You appear for the defendant and wish to put in issue the existence of the corporation. Draw the clause in your answer necessary to do so. Omit verification.

306.

6. A conductor finds a sum of money in a railroad car and turns it over to the company. Each of two persons make a separate demand on the company for the same and one brings action. The company is in doubt as to whom it belongs.

What course would you advise the company to take?

307.

7. Your client is a tenant in possession of a dwelling-house under a lease having three years to run. The house takes fire and is injured thereby. The tenant consults you as to his right to surrender the premises because of said fire and his liability to pay to the owner rent for the time subsequent to the surrender.

State the rule.

308.

8. A, the owner of certain premises in the city of New York, leased them to B for the term of five years from May 1, 1898, at the annual rent of \$5,000 a year payable quarterly. The lease was in writing and B went into posses-

sion. On June 2, 1899, B wrote a letter to A stating his intention to abandon the premises at once and to no longer pay rent therefor; he left the same day. To this letter A made no reply. Thereafter A, acting in good faith, and with a desire to diminish his claim against B, let and rented the premises to C for the balance of the term at the annual rental of \$4,000, which was the best figure he could procure therefor. A now seeks to hold B for the difference in the rent. B consults you. What do you say as to his liability? Give your reasons.

### 309.

9. A, as landlord, executed and delivered to B, as tenant, a written lease of a certain factory in the city of X for a term of years beginning May 1, 1904, at an annual rental of \$1,000. On May 1, 1904, B found X, a former tenant of A, in possession of the demised premises, who wrongfully withheld the same from both A and B. B was compelled to have a factory for use at once, and he thereupon notified the landlord that as he had not given him possession of the factory on May 1, 1904, he elected to terminate the lease, and he hired and entered into possession of another factory. The landlord refused to accept the surrender and proposes to hold B for the rent reserved in the lease.

B consults you. What do you say as to his liability? Give your reasons.

### 310.

10. A owned a horse, for which B offered him \$500. A at once accepted the offer and it was agreed that the horse should be delivered and paid for on the following day. Nothing further transpired until the next day, when B tendered the agreed price, demanded the horse, and A refused to perform the contract. The value of the horse was \$1,000. On the trial of an action brought by B against A for breach of his contract all these facts, including value, were admitted. Who should have judgment, and why?

### 311.

11. Where a valid contract was made for the sale and delivery of specific articles of personal property under which

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the title did not vest in the vendee, and the property was destroyed by accident, without fault of the vendor, so that delivery by him became impossible, is the vendor liable to the vendee in damages for non-delivery? Give the reason for your answer.

312.

12. A loaned to the firm of C and D \$5,000, to be used in its business for one year, under an agreement that he was to receive one-third of the profits, and if at the end of the year he did not conclude to become a partner, he was to be repaid out of the copartnership funds. During that time L sold and delivered to the firm goods which were used in its business, of the value of \$1,000. They were not paid for, and L brought an action to recover therefor and made A a party defendant with C and D. A alone defended. At the trial there was no dispute as to the facts, and the only question of law presented was whether A was liable to the plaintiff as a member of such firm. What should have been the decision, and upon what ground?

313.

13. A and B were copartners engaged in dealing and speculating in real estate. They owned certain land which they sold to one D, the contract by D being induced by the fraud and false representations of A, which were material, and upon which D relied in making the purchase. When D learned of the fraud he brought an action in fraud to recover the price paid for the land, and made both A and B parties defendants. On the trial the court was requested by B to instruct the jury that he was not liable unless he was personally guilty of the fraud charged. The court denied this request, and B excepted. Was the exception well taken? Give your reasons for the answer.

314.

14. Two valid bonds, negotiable by indorsement only, were duly made and issued by the county of S. They were payable to R and delivered to him. R, for a valuable consideration and before maturity, by indorsement in blank,

duly transferred and delivered them to C. While in the hands of C, thus indorsed, they were stolen. Subsequently they were offered for sale to A, who became a purchaser for a valuable consideration and before maturity. At that time R's indorsement upon the bonds had been erased, but of that A had no knowledge. The person offering them, however, falsely personated R and indorsed R's name on the bonds and delivered them to A. Afterwards C sued A for the bonds. For whom should judgment be given, and why?

### 315.

15. A presented to B for his signature a paper which he represented to be a duplicate of an order for certain personal property, which B had already made, and B, without reading or examining the paper presented, signed and delivered it to A. It was in fact not an order but a negotiable promissory note, payable thirty days after date. Before it became due C purchased it in good faith and paid a valuable consideration therefor. When it became due it was not paid, and thereupon C brought an action on the note against B.

These facts being conceded, who should have judgment? Give your reasons.

### 316.

16. A loaned to B \$1,000, for which B gave his promissory note payable to A's order one year from date, at the office of W. A being subsequently informed by one M, her son-in-law, that B wished to pay the interest and renew the note for one year, gave the note to M, without indorsement, and with instructions to receive the interest and take a new note indorsed by C for the payment for the principal. Before the maturity of the note, however, B left the money to pay it with W at the specified place of payment. When the note became due M presented it at that place with a forged order directing its payment to him. Upon receiving the note and order W, in the presence of B, paid the money to M, who paid the interest to A and absconded with the principal. A sued B for the principal and the foregoing facts were undisputed. Who should recover, and why?

**317.**

17. A delivered a certificate of stock to B as collateral security for a loan of \$1,000 by A to B. While B thus held the certificate he applied to a bank for a loan upon it of \$2,000, in effect stating that he wanted it for A. The bank agreed to make the loan if B would procure from A a proper power of attorney to be attached to the certificate. B did not procure the \$2,000 loan for A, but for himself, and he procured the power of attorney by representing to A that he, B, ought to have it to secure his loan of \$1,000. B then delivered the certificate and power of attorney to the bank and obtained the loan of \$2,000. Subsequently the bank, as alleged pledgee, brought an action to foreclose a claimed lien on the stock for \$2,000, making A a party to the action. A defended on the ground that B had no authority to pledge the stock, and that as B did not claim to the bank to be the owner of it, the bank obtained no title or interest therein, which would enable it to maintain the action. Who should have judgment, and why?

**318.**

18. A and B were copartners engaged in a mercantile business under the firm name of A and B. C was surety to the firm for the payment of its purchases. B died, but the business was continued under the said firm name by A and the administrator of B's estate, who contracted debts for purchases to the amount of \$5,000, and then became insolvent. The creditors claim that C is liable, as surety, for the amount. He claims otherwise. What do you say? Give your reasons.

**319.**

19. A gave his promissory note, with B, C and D as sureties. Thereafter A became insolvent. B paid the note when it became due. Subsequently C became insolvent. B now consults you as to his rights, if any, against D under the circumstances. State fully, with your reasons.

**320.**

20. A entered into an agreement in writing with B to sell and convey to B thirty days after the date of the agreement,

a house for the sum of \$15,000, which B agreed to pay upon delivery of the deed. B at once, and before the payment of any part of the purchase money or the delivery of the deed to him, took out a policy of fire insurance in the Z. Fire Insurance Company upon the house for his own benefit. The next day the house burned. The insurance company refused to pay the loss, claiming that B had no insurable interest. B brings an action upon the policy. Can he recover? If so, why? If not, why not?

321.

21. A, who had no property, was indebted to B in the sum of \$2,000. B procured an insurance on the life of A, payable, in event of death, to himself, B. The policy provided that it should be null and void in case the insured should "die by his own hand or act voluntary or otherwise." A, the insured, became sick, and accidentally, and with no intent to cause death and being perfectly sane, took an overdose of medicine prescribed by his physician, from the effects of which he died. The company questions its liability upon the policy. What do you say, and for what reason?

322.

22. A guest at a country inn, having valuable jewels, placed the same in the innkeeper's safe in compliance with a printed notice posted in the guest's room. The safe was opened by burglars without negligence on the part of the innkeeper or the guest and the jewels were stolen. The guest brings an action against the innkeeper for the value of the jewels. Can he recover? Answer fully, with your reasons.

323.

23. The X. & Y. Railroad Company received for transportation to Buffalo a carload of valuable horses. After arrival at destination and before the horses could be taken from the custody of the railroad company, a great fire broke out in the city, and without any fault on the part of the railroad company extended to the car containing the horses, and they

were burned to death. Is the railroad company liable for the value of the horses? If so, why? If not, why not? Answer fully.

324.

24. A sold by sample 1,000 bushels of wheat to B and a like amount to C to be delivered at A's warehouse. B paid in full for the amount of his purchase, but C paid nothing. A measured out the respective amounts of wheat which awaited B's and C's orders and immediately thereafter the warehouse and its contents, including both parcels of wheat, were destroyed by fire. A sues C for the price of the wheat sold to him, and B sues A for the value of the wheat purchased by him. What are the rights and liabilities of A, B and C, respectively? Answer fully, with your reasons.

325.

25. A entered into a contract with B to manufacture and deliver to B a boiler and engine which was expressly warranted should be of sufficient capacity and power for a mill owned by B. Upon delivery of the boiler and engine B at once saw that they were incapable of doing the work required of them, but without notice of defect to A B set them up and brought suit against A to recover the damages sustained by him because they did not comply with the contract. Was he entitled to recover? If so, why? If not, why not?

FIRST AND SECOND JUDICIAL DEPARTMENTS.

New York City (Borough of Manhattan), April, 19, 1905.

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**EXAMINATION PAPER.**

Afternoon — Four Hours.

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**326.**

1. On the trial of an action, the plaintiff called a witness on his behalf, and interrogated him to establish a material fact. The witness answered opposite to what he told plaintiff's attorney the fact to be. Thereupon plaintiff called a witness to prove that the particular fact his former witness testified to was otherwise, and objection was made to the competency of his testimony.

What should the ruling of the court be, and why?

**327.**

2. You desire to examine on the trial of an action the president and books of account of the defendant corporation.

How would you proceed?

**328.**

3. A and B entered into an agreement, which was reduced to writing. In an action between X and B, the agreement became relevant to the issue and X offered parol testimony contradicting the same, and to show what the real transaction was. Objection was made thereto.

What should be the ruling of the court, and why?

**329.**

4. A brought an action against X to rescind a contract to purchase shares of stock and to recover the purchase price thereof, on the ground that he had been induced to enter

into the same because of false and fraudulent representations in relation thereto, made to him by the defendant and on which he relied.

On the trial, plaintiff offered testimony of other similar representations made about the same time to other purchasers of the stock by the defendant. Objection was made thereto.

What should be the ruling of the court, and why?

330.

5. On the trial of an action, the defendant called X as a witness. On his cross-examination, plaintiff's attorney asked him the following question: "Is it not a fact that you were convicted of the crime of burglary at the Erie Trial Term in January, 1905?" Objection was made thereto.

What should be the ruling of the court, and why?

331.

6. A and B met by accident and agreed that at a certain hour on the night of the following day they would burglarize the residence of C, and arranged the part each should take therein and separated. For some reason the matter was dropped, and nothing further was done or said about committing the crime. Were they guilty of a crime or not? If so, what? If not, why not?

332.

7. Upon the trial of a criminal action for felony the jury found the defendant guilty. He appeared for judgment and waived the appointment of a time for pronouncing the same. The court thereupon, without asking him any further questions, sentenced him to State prison for a lawful period of time. Was the judgment and sentence of the court valid or not? If so, why so? If not, why not?

333.

8. On the trial of X under an indictment for murder in the first degree, it was established that the prisoner committed the act while in a state of voluntary intoxication.

The prisoner's counsel asked the court to charge the jury that the defendant's intoxication at the time might be considered by them in determining the intent with which the act was committed, and the grade or degree of his crime.

The court refused so to charge, and the defendant was convicted of murder in the first degree. Was the refusal to charge erroneous or otherwise? Give your reasons.

### 334.

9. A agreed to purchase of B two hundred hogs and pay him the market price therefor, if delivered within four weeks, and A had not been previously supplied within that time. B drove his hogs to the place of delivery and offered them to A, who, although the contract was void under the statute of frauds, would have taken and paid for them but for the fact that one C, who had learned of the contract between A and B, induced A to purchase his hogs by falsely and fraudulently representing to A that B had taken his hogs to another market and did not intend to fulfill his contract. This statement was false and known by C to be so, and was intended to and did deprive B of the benefit of his contract. Upon learning these facts B sued C for fraud and proved damages to the extent of \$400. These facts being undenied, for whom should judgment be given? Give reasons.

### 335.

10. M owned and possessed a right of way over the farm of B, subject to the duty of maintaining gates across the way, at each end thereof. M removed the gates. Afterwards, while M was engaged in making necessary repairs to the way, B, claiming that M had lost his right of way and was therefore a trespasser, assaulted and beat M in an effort to eject him from the farm as such trespasser. An action therefor was brought by M against B. The latter alleged as a defense that by the removal of the gates M had broken the condition upon which his right depended, and that he thereby lost his right to the use of the way, and hence the action of B was justified in removing M as a trespasser.

upon his premises. Conceding these facts and that M sustained damage, for whom should judgment be given, and why?

### 336.

11. A purchased a ticket for a passage upon the railroad of the X. Railroad Company, entered one of its cars and before reaching his destination lost his ticket. When he attempted to pass through the gate across the passageway from the station, he was stopped by the gatekeeper of the company and informed that he could not pass until he paid his fare or purchased a ticket. He stated to the gatekeeper that he had purchased a ticket and its loss. When he persisted in attempting to pass he was pushed back by the gatekeeper, who then ordered his arrest. He was arrested and taken to the police station and locked up over night. In the morning he was examined and discharged. The company had ordered its gatekeeper not to let passengers pass from the station until they had paid their fare or showed a ticket. A sued the company for false imprisonment. Was it liable? If not, why not? Give your reasons.

### 337.

12. A died owing a valuable parcel of real estate. He also left a last will and testament by which he devised it to his executors in trust for the benefit of the X corporation, and expressly declared by his will that no portion of his real estate should go to his heirs-at-law. The devise for the benefit of the corporation proved to be invalid, and his heirs-at-law then brought an action against the executors, who were in possession, to recover the real property of which A died seized. What should be the decision? Give your reasons.

### 338.

13. In an action under the Code to establish the will of D, it appeared on the trial that the testator, instead of signing the will at the end and immediately after the testimonium clause, signed it after the attestation clause, where the subscribing witnesses also signed.

Was the will executed by the testator as required by statute? Give the reasons for your answer.

### 339.

14. D died leaving a last will and testament, whereby he devised to A, his widow, all of his real estate for the term of her natural life. The testator's will then provided that "from and after his widow's death" his real estate should go to his heirs-at-law. At his death the testator left him surviving A, his widow, and C, a daughter, who was his only heir at law.

What estate did C take under her father's will in the real property left by him? Was it a vested remainder, the enjoyment of which was postponed during the life of the widow, or was it a contingent remainder which was dependent upon C's surviving the testator's widow? Give your reasons.

### 340.

15. A, being the owner of a farm of 100 acres, sold it to B for \$5,000 and gave him a deed thereof. Upon the delivery of the deed B paid \$2,000 in cash and gave his promissory note for the remaining \$3,000, payable to the order of A. Thereupon B entered into and still holds the possession of the farm. Subsequently, and before the note became due, B became insolvent and the note was consequently uncollectible. A, thinking he ought in some way be able to hold the farm for the payment of the unpaid purchase price, consults you. Has he any remedy except upon the note, and if so, what?

### 341.

16. A owned several vacant lots upon which he intended in the following spring to commence the erection of a business block. In the previous fall he gave B a license to occupy them for storing stone until spring, when the stone were to be removed by B, who paid nothing for the use of the lots. In the spring A ordered B to remove the stone, which he neglected to do. Thereupon A commenced a suit in equity against B to compel their removal. B defended

on the ground that the suit could not be maintained because A had an adequate remedy at law, and this was pleaded as a defense. After issue was thus joined you were consulted by A as to the validity of that defense. What would be your advice? Give reasons.

**342.**

17. A was the owner of a vacant city lot. B had \$5,000 upon which he was receiving only three per cent interest. B proposed to A to use his money in building a block of buildings upon A's lot, to the end that A would receive something for the use of the lot and that B would receive more than three per cent for the use of his money. A assented to B's proposition and agreed that if B built the block he should have a right to sell it, and should then pay A the value of the lot. This agreement was not in writing, but B relied upon and in pursuance of it erected a block upon A's lot. After the block was completed A at once denied that B had any right to or interest in the property, whereupon B brought a suit in equity to establish and enforce his rights, if he had any.

Could B maintain the suit and to what relief, if any, was he entitled?

**343.**

18. The X. Company, a stock corporation, was duly formed under the laws of the State of New York. After the certificate of incorporation had been filed in accordance with law the incorporators of the company determined that it failed to express the true object and purpose of the corporation, and that the same should be changed so as to truly set forth such object and purpose. How did they accomplish the result desired? Answer fully.

**344.**

19. A is the owner of 51 per cent of the capital stock of the X. & Y. Ry. Co. The stockholders of the company are to decide whether the company shall purchase a number of locomotives which are necessary for the business of the company, and a meeting of stockholders is held for the pur-

pose of voting upon the purchase. A moves that ten locomotives be purchased from himself, he being a locomotive manufacturer, for \$125,000, the locomotives having cost him \$100,000, which fact he discloses to the other stockholders. His motion is carried by his vote upon 51 per cent of the shares of the capital stock, against the vote in opposition of stockholders owning 49 per cent of the capital stock. A minority stockholder brings suit to restrain the purchase upon the facts stated, no fraud being alleged. Will the action lie? If so, why? If not, why not? Answer fully.

### 345.

20. The "A. Company," a domestic corporation, made its promissory note for \$10,000 payable three months after date to the order of X, and agreed to pay interest thereon at the rate of 10 per cent. The note was duly authorized by the directors, executed by the proper officers and the proceeds thereof were applied to the corporate uses of the corporation. The note was not paid at maturity, and X brought an action thereon against the corporation. Upon the facts stated had the company a defense to the note? If so, what defense? If no defense, why?

### 346.

21. The guardian of a minor suffered waste of the inheritance of his ward to the amount of \$5,000. You are asked what relief or remedy, if any, may be enforced on behalf of the ward. What do you say?

### 347.

22. A and B own a parcel of real estate as tenants in common. A had divorced his wife for adultery and B's wife had divorced him for the same cause. They are about to transfer the title to the property to your client and offer a deed of the same not signed by either of the former wives. Questions arises as to the sufficiency of the deed. What do you say, and why?

## 348.

23. X and Y were duly married, X, the husband, absented himself for six successive years without being known to Y, the wife, to be living during that time. Y thereupon married Z. X returns and claims the right to resume marital relations with Y, to which Z objects. What are the rights and obligations of the respective parties? Answer fully, with your reasons.

## 349.

24. A was killed in a railroad accident and his administrator commenced an action against the railroad company to recover \$20,000 damages therefor. After the commencement of the action the Legislature passed an act limiting to \$10,000 the amount recoverable in an action to recover damages for injuries resulting in death. The jury rendered a verdict in favor of the plaintiff for \$15,000, upon which judgment was entered for that amount. A question arises as to the validity of the judgment. Is it valid? If so, why? If not, why not?

## 350.

25. A was arrested on a warrant charging him with murder, and, on being taken before the magistrate issuing the warrant, demanded an examination. On such examination, A appearing with counsel, B was sworn as a witness on behalf of the people, and his testimony reduced to writing by the magistrate. Opportunity was given to A and his counsel to cross-examine the witness, which was declined. The evidence given by B was read over to and signed by him and properly certified by the magistrate. A was held for the grand jury and subsequently indicted on the charge. On the trial of the indictment, B having died, the district attorney offered in evidence the deposition of B taken before the magistrate. The prisoner's counsel objected as in violation of his client's constitutional rights. Was the objection sustained or not? State your reasons. What constitutional right is involved?

FOR THE STATE OF NEW YORK.

New York, Albany and Rochester, June 19, 1905.

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EXAMINATION PAPER.

Forenoon — Four Hours.

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351.

1. Draw an affidavit of personal service of a summons in the Supreme Court upon an infant defendant under the age of fourteen years.

352.

2. A was the sole administrator of B, who died leaving him surviving a wife and next-of-kin. B's death was caused by the wrongful act of C. Subsequently C died, and D was duly appointed as his executor. Thereupon A, as administrator of B, brought an action against D, as executor of the estate of C, to recover damages for such wrongful act of his testator. These facts were fully alleged in the complaint, and the defendant duly demurred thereto. What should be the decision, and why?

353.

3. A sued B, alleging an account stated. B interposed a general denial, and offered to prove that the dealings constituting the account mentioned were between B and C, and that the indebtedness of B thereon was to C, and not to A. A objected to that evidence upon the sole ground that it was not admissible under the pleadings. What should be the ruling, and why?

354.

4. A owned a farm upon which he gave B a mortgage to secure a usurious loan of \$5,000. A devised the farm to C, and then died. After A's death C brought a suit in equity

against B praying for a judgment that said mortgage be declared void for usury, and be set aside and canceled. B demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, in that it failed to allege that C had paid, or offered to pay, the sum actually loaned to A. What should the decision be?

### 355.

5. A, an infant without having a guardian *ad litem* appointed, commenced an action against the R. Co. Issue was joined and the case came on for trial. At the close of the evidence the defendant moved for a non-suit on the ground that the plaintiff was prosecuting the action without the appointment of a guardian. An application was then made by the plaintiff for the appointment of a guardian *ad litem nunc pro tunc*. Had the court jurisdiction to grant the plaintiff's application, or was it required to grant the defendant's motion for a non-suit? Give the reasons for your answer.

### 356.

6. In an action in which you are the defendant's attorney it is necessary to make and serve an affidavit of merits, to be verified by the defendant. Draw such an affidavit stating fully the facts required to be alleged therein.

### 357.

7. A owned a farm which B agreed to purchase and for which he agreed to pay A \$5,000. The contract between them was in writing, but contained no agreement warranting the title. The farm was subject to a mortgage for \$4,000, which had been recorded, but its existence was unknown to B as matter of fact when the contract was made. Subsequently B learned of it and that the farm had been sold on its foreclosure. He then refused to perform the contract. A, however, insisted that, as the contract contained no express warranty of the title, B was bound to pay the agreed consideration, and brought an action against B therefor. In the absence of an express warranty could A recover? Give the reasons for your answer.

**358.**

8. A gave B a mortgage upon certain real estate nominally to secure the payment of \$20,000 on demand. In fact, it was to secure advances thereafter to be made by B, under a contract by A to erect three houses upon the mortgaged premises, the advances to be made as the buildings progressed, the houses to be completed within one year. If the work proceeded according to the contract, no demand was to be made for the mortgage debt until ninety days after A was entitled to his last advance. B advanced \$10,000 under the contract when A abandoned it, leaving the houses unfinished, and made a general assignment to C for the benefit of creditors. B thereupon commenced an action to foreclose his mortgage without demand and without waiting for the expiration of the time set for the completion of the buildings. C, as such assignee, defended upon the ground that a demand before action was necessary, and that the action was prematurely brought. Was the judgment for B, or was it against him, and why?

**359.**

9. H was the owner in fee of certain city lots situated upon D street, which was closed in 1900, in pursuance of a statute passed in 1899. In 1902 H sold and deeded the lots to B by a deed containing the usual covenants of warranty, and which bounded the lots in front by the side of D street. The award of damages to the lots caused by closing the street was made in 1904. H claimed the amount of the award, and it was also claimed by B. For whom was judgment given, and why?

**360.**

10. The X Bank held A's note for \$500; A was away at the time of its maturity, having made no provision for its payment. B, who took a friendly interest in the affairs of A, to prevent A's credit being impaired, without the request of A, paid the note when due, and thereupon the bank canceled it. B honestly expected, when he made the payment, because of his friendly relations with A, that A would reimburse him therefor. Upon A's return B informed him of his payment of the note and his reasons therefor, for which A

expressed his gratitude. A few weeks later, A having said nothing about reimbursement, B requested it, which A refused, whereupon B brings an action to recover from A the amount so paid for his benefit. A defends. Who wins, and why?

**361.**

11. The plaintiff was employed by the defendant "at the rate of \$1,000 per year," nothing more being said. At the end of the first month the plaintiff left defendant's employ without cause and demanded pay for the month's service rendered, which defendant refused. Thereupon plaintiff sued defendant for the month's wages under the contract. The defendant in his answer set up the contract, alleged the plaintiff's breach thereof and his own readiness to perform, and demanded a dismissal of the complaint. The above facts being established upon the trial, judgment for whom, and why?

**362.**

12. A and B were rivals in the mercantile business. A had in merchandise and accounts \$100,000, while B had \$50,000. They signed a limited partnership agreement under the statute, which was filed, recorded and published according to the facts, in which A was made the general partner and B the special, or limited, partner, with a capital of \$150,000, of which A contributed his said merchandise and accounts at \$100,000, and B his said merchandise and accounts at \$50,000. The new firm thereafter failed, with liabilities amounting to \$150,000. What is the liability of A and B, respectively, for the debts of the concern? State your reasons.

**363.**

13. A, B and C were copartners. X commenced an action against the firm, on a firm obligation, by the service of a summons and complaint on A only. A defaulted and X thereupon entered judgment against A, B and C and issued execution to the sheriff of the county where the firm did business and where A, B and C lived. The sheriff has levied on the entire stock of the firm which is concededly insuffi-

cient to satisfy the judgment, and has advertised it and C's private dwelling-house for sale under the execution. C consults you as to his rights, if any, in the premises. What do you say, and why?

364.

14. A made his promissory note payable to the order of X, an infant. X, for value, and before maturity indorsed the same over to B. The note was protested for nonpayment and due notice given, etc. B sued A thereon, who defends on the ground that X was an infant, and that by reason thereof his indorsement did not pass title or the property in the note to B. B demurs to the answer. Judgment for whom, and why?

365.

15. A made his note payable to the order of B, who duly indorsed it over to C, who duly indorsed it over to D, who indorsed it over to E, who duly indorsed it back to C, all in due course. The note is dishonored, duly protested, etc., notice being given to all indorsers. C sues A, B, D and E on the note. The defendants all consult you as to their respective liabilities. What do you advise, and why?

366.

16. A was a general agent for B in buying and selling horses, who was instructed by B never to warrant any horse he sold for him, but that the buyer must purchase at his own risk. Notwithstanding and contrary to such instructions, in selling a span of horses to C A warranted them kind and sound in every particular. C was ignorant of B's instructions to A. The horses proved to be both unkind and unsound, to the great damage of C, who sued B for such damage, relying upon the said warranty. Judgment for whom, and why?

367.

17. A commercial agent, X, sold by sample to B 1,000 bushels of malt and forwarded the order to his house to be filled. The house promptly accepted the order and delivered the malt, to be paid for at thirty days. The house had had

no previous dealing with B. Upon the expiration of the time X called upon B and collected from him payment for the malt, stating that, although an agent simply, he was authorized to collect, when, in fact, he was especially instructed by his house not to collect. The agent absconded with the money. Upon whom does the loss fall? State your reasons.

### 368.

18. A was surety for B, the maker of a promissory note. After its maturity the holder of the note said to B: "I'll not bother you on that note, nor sue you thereon for ninety days, in view of your present poverty." The holder knew at the time that A was surety on the note, yet neither he nor B informed him of the transaction, and he knew nothing of it until after the ninety days agreed upon had expired. By reason of the above transaction A claims to be released as surety. What do you say, and why?

### 369.

19. A was surety to C for B. C had received collateral security from B for the same debt, which fact was unknown to A. When the debt became due A paid it and thereupon C returned the collateral to B, who disposed of it and then became insolvent. A now learns of the above facts and asks you if he has any remedy in the premises. What do you say?

### 370.

20. A policy of fire insurance provided that the entire policy should be void if the insured dwelling-house, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days. The house in question was a dwelling-house on a farm. It was occupied as a summer residence by the owner, who, when he moved into the city in the fall, left all his furniture in it and put the same in charge of his farmer, who resided in another house on the farm, as caretaker. The farmer had a key to the house and went into and inspected the same regu-

larly and at least once a week. The owner visited it regularly every two weeks and made a thorough inspection thereof, and on those occasions lunched therein. No person slept in it. After the premises had been in the above condition for about two months it was destroyed by fire. The company now refuses to pay the loss, claiming a breach of the above condition. Is the company liable? If so, why so; if not, why not?

### 371.

21. A policy of life insurance contained a clause that if the proposals, answers and declarations made by the insured, and on which the policy was issued, should be found in any respect false or fraudulent, then the policy should be void. In his application for the policy the insured warranted his age to be thirty years, when, as matter of fact, he knew he was thirty-five years old. The agent who took the policy on behalf of the company knew that the insured was thirty-five years of age and the falsity of the warranty. The insured having died, the company contests the policy. On the above facts judgment for whom, and why?

### 372.

22. X consigned to A, an auctioneer in the city of New York, for sale on his account certain merchandise, his property, of the value of \$10,000. While in the auctioneer's possession the property was levied upon by the sheriff of New York county under an execution in an action in which one Z was the sole defendant, and was advertised and sold by the sheriff under a claim that the merchandise was the property of Z, the judgment debtor, and not the property of X, of all of which X had no notice, nor did A take any steps to prevent the sale. X, when he learned what had taken place, demanded of A, the auctioneer, the return of the property or its value, both of which demands the auctioneer refused to comply with, justifying his refusal upon the above facts. X now sues the auctioneer for the value of the consignment. The above facts appearing, judgment for whom, and why?

373.

23. A delivered to B a quantity of cloth and other necessary material from which B agreed to make and deliver to A, 10,000 pairs of trousers, at \$1.50 per pair. When B made up 5,000 pairs of the trousers his factory, accidentally and without his fault or negligence, took fire, in which fire all the made-up trousers and the remaining stock of goods were totally destroyed. A thereupon sued B for his damage caused by B's inability to perform his contract, and B counterclaimed for \$7,500, the value of the labor he had expended in completing the 5,000 pairs of trousers not delivered. Judgment for whom, and why?

374.

24. On May 1, 1905, A and B entered into a valid contract in and by which A agreed to sell and deliver to B on June 1, 1905, 1,000 barrels of flour, which B agreed to accept and to pay A five dollars per barrel on delivery. On May 15, 1905, B notified A of his intention not to accept delivery of the flour, nor to pay for the same on June first. Thereupon and without tendering the flour A sent the same to public auction and after due advertisement and notice to B sold the same on May 19 to the highest bidder for \$4 a barrel. On May 20 A began suit against B to recover the deficiency on the sale. Can A maintain his action? Give your reasons.

375.

25. A wrote to B saying, "Send me, by American Express, at once 5,000 X brand cigars on a credit of six months." B immediately expressed to A by American Express, as requested, 4,000 X brand cigars and billed them on a credit of five months, stating that the remaining 1,000 cigars would follow in a couple of weeks, or, as soon as he could manufacture the same. The 4,000 cigars shipped were lost in transit, and B sues A for their value, claiming that he delivered them to A's agent, the express company, at his request, and that as between them A must stand the loss. A defends. Judgment for whom, and why?

FOR THE STATE OF NEW YORK.

New York, Albany and Rochester, June 19, 1905.

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EXAMINATION PAPER.

Afternoon — Four Hours.

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376.

1. A sued B to recover damages for an assault with a loaded gun. On the trial, the court having already charged the jury that the burden was upon the plaintiff to prove his case by a preponderance of evidence, B requested the court to further charge that he was presumed to be innocent until he was proved to be guilty. This the court declined to charge and B duly excepted. Was the exception well taken? Give the reasons for your answer.

377.

2. A gave to B his promissory note for \$2,000, in which it was stated to be for money loaned. When it became due B sued A thereon, who defended on the ground of want of consideration. On the trial B offered to prove that the note was given for the board, care and nursing of A furnished to and performed for him by B. This evidence was objected to by A on the ground that it contradicted the note, which was in writing, and hence was inadmissible. What should the ruling be?

378.

3. A, as administrator of B, brought an action against the X. Co. to recover for its alleged negligence causing the death of B. No one witnessed the occurrence, which resulted in B's injury and subsequent death. About thirty minutes after the accident the decedent told a witness how it occurred. On the trial the plaintiff called this witness and

offered to prove by him the declarations of the decedent as to how the injury happened. The evidence was objected to by the defendant upon the ground that the declarations of the decedent were incompetent, were no part of the *res gestae*, and that such declarations were subsequent to the injury and at a different place. What should the ruling be?

## 379.

4. A, an heir-at-law of D, brought an action against B, the grantee of D, deceased, to set aside a conveyance of land made by the decedent to B on the ground that it was obtained by undue influence. On the trial E, the decedent's widow, who, as his wife, joined in the conveyance by D to B, was called as a witness for A and interrogated as to a personal transaction between herself and her deceased husband relating to such property and the transfer thereof. This evidence was objected to as inadmissible, and that the witness was incompetent under section 829 of the Code, on the ground that she was interested in the event of the action. These objections were overruled, and the defendant excepted. Was the exception well taken?

## 380.

5. A gave B his promissory note for \$1,000 loaned to him by B. It was payable, with interest, thirty days after date. Ten years afterwards B died and C was appointed as his administrator. Thereupon C, as such administrator, sued A upon the note, and A pleaded the statute of limitations as a defense. On the trial the note was produced in evidence, with indorsements of part payments thereon, which were in the handwriting of B. They were all dated more than seven years after the note was given. No other proof was offered. For whom should the court direct judgment, and why?

## 381.

6. A was duly indicted for grand larceny and brought to trial thereon. The trial commenced on Monday, continued through the day when the court and the trial were adjourned

until Tuesday. On Tuesday the court did not convene, because of the inability of the judge to reach the court, owing to the prevalence of a blizzard, but it reconvened on Wednesday and proceeded with the trial without objection from the defendant. The trial resulted in a verdict convicting A of the crime charged. When sentence was moved A moved for a new trial and arrest of judgment on the ground that the court was not in session when the verdict was rendered; that not having reconvened on Tuesday it was dissolved and its subsequent proceedings were without jurisdiction. What was the decision, and why?

## 382.

7. A was charged in an indictment with having committed a specific crime constituting a felony. On the trial of the indictment the proof disclosed that A was absent at the time the crime was committed, although he advised and procured its commission. A objected to the submission of the case to the jury on the ground that the proof showed that he was absent at the time of the alleged commission of the crime, and hence there was no sufficient allegation in the indictment of the facts constituting the crime proved. Was the indictment sufficient? Give the reasons for your answer.

## 383.

8. P was indicted for the murder of B. On the trial of P it was proved that a dead body was found, alleged to be that of B. There was no direct proof of that fact, but there was evidence of circumstances which were sufficient to justify a jury in finding, beyond a reasonable doubt, that the body found was that of B. Could that fact be established by the circumstantial proof under section 181 of the Penal Code, which reads: "No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed, and the fact of killing by the defendant as alleged, are each established as independent facts, the former by direct proof, and the latter beyond a reasonable doubt." Give your reasons.

384.

9. While A was an ordinary passenger on the X. Railroad the train suddenly left the track and he was badly injured. On the trial, in an action brought for damages, A proved the foregoing facts and rested. The X. Company moved for a nonsuit on the ground that plaintiff had shown no negligence against the company. How was the motion decided? State your reasons.

385.

10. A and B were walking together and they casually met C, a practicing physician, to whom B bowed. A thereupon said to B: "I do not recognize C now; he is a liar and dishonest." Nothing more was said. B reported the conversation to C, who sued A for slander. On the trial C proved the above facts and rested. A thereupon moved for judgment. Judgment for whom and why?

386.

11. A and B owned adjoining vacant lots on a side hill in the city of X. The lot owned by A was above that of B, and the surface water, which came in the time of rain, flowed naturally from A's lot down to and over and across B's lot which was below. B built upon his lot a house, which caught and dammed the water which theretofore flowed naturally down the hill and threw it back upon A's lot to his damage. A sues B therefor. Can he recover? Give your reasons.

387.

12. A had two children, B and C, and thereafter duly adopted as a child, D, a minor. Subsequently the father, A, made his will, leaving all his property to "the heirs of A, share and share alike." The father died and his said will was duly probated. B, C and D consult you as to their respective rights and interests under the will. What do you advise, and why?

388.

13. A, by his will, devised and bequeathed a house and lot and \$10,000 in cash to his son, B, and then gave all his

residuary estate, real and personal, to C. The legacy and bequest to B lapsed by reason of his death occurring in the lifetime of A. After A's death and the probate of his said will C claimed the house and lot and the \$10,000 as residuary legatee. A's executors also make claim to the \$10,000 in the interest of the next-of-kin of the testator. D, the only surviving child of A, for whom no provision was made in the will, claims the house and lot by descent. Who is entitled to the house and lot and the \$10,000? Give your reasons.

389.

14. A, who was but twenty years of age, made his last will and testament whereby he bequeathed all of his personal property, amounting to \$20,000, to B, one of his brothers, and devised his real estate, of the same value, to his other brother, C. A died without lawful descendants, leaving him surviving his widow, D, and his said two brothers. Both his father and mother are dead. What do you say as to the validity of the provisions of the will, and if the same is probated, how will the property be distributed and descend?

390.

15. A held a past-due mortgage on the farm of B, which B was unable to pay. B requested C, his wife, to furnish the money from her separate estate and take an assignment of the mortgage to herself, to which she consented, and gave the money therefor to her husband. B, the husband, instead of procuring an assignment, obtained from A a satisfaction of the mortgage, which he duly recorded, all without his wife's knowledge or consent. The wife, discovering the situation, consults you as to her rights. What do you advise, and what equitable principle is involved?

391.

16. A died leaving an estate of \$50,000, consisting entirely of cash. By his last will and testament he directed that \$10,000 thereof should be expended by his executors in the purchase of a farm for his son, B, to whom title in fee

should be given. Before such purchase could be made by the executors B died intestate, leaving a widow and one child him surviving. How shall the \$10,000 be distributed, and what equitable principle is involved?

392.

17. There was a past-due mortgage on the farm of A, held by B, duly recorded. A paid to B the amount of the mortgage, but instead of a satisfaction and discharge he obtained a written assignment of the mortgage from B, the name of the assignee being left blank, but did not record it. Subsequently A sold the farm to C subject to the mortgage, it being expressed in the deed that C assumed and agreed to pay said mortgage. One month after title passed to C A filled up the blank assignment by inserting the name of D as assignee, and sold and delivered it to D. D demanded payment of the mortgage, which C refused, he having first learned the facts after he took title, and D commenced foreclosure. C defended, claiming payment and satisfaction of the mortgage, and asked to have the same discharged of record. Judgment for whom, and what equitable principle is involved?

393.

18. The X corporation was capitalized for \$10,000, consisting of 2,000 shares of stock of the par value of five dollars a share. At the annual meeting of the stockholders, duly called for the purpose of electing directors, there were three tickets in the field. The A ticket received 250 votes, the B ticket 400 votes and the C ticket 200 votes. The inspectors of election certified the B ticket as elected, but the old board of directors refused to vacate or surrender their offices, claiming to hold over as directors, because a majority of the stock not having voted at the annual election, there was no valid election of their successors. What do you say? Give your reasons.

394.

19. A was a stockholder and director of the X. Stock Company. He was also a lawyer and was retained by the

board of directors to defend the corporation in several litigations pending against it, which he did, the reasonable worth and value of his services being \$1,000. There was no express resolution of the board passed containing an agreement to employ and compensate A for his services as attorney, nor was he entitled by the by-laws of the company to any salary for official services. Question arises whether, upon the above facts, A has a valid claim against the corporation. What do you say, and why?

395.

20. The board of directors of the X corporation consisted of five persons. At a regular meeting of the board, at which but three of the directors were present, by a vote of two directors in the affirmative and one in the negative, the president was directed to execute and deliver the promissory note of the corporation for a certain specified corporate purpose. Thereafter the dissenting director and the two absent directors signed a paper forbidding the issuing of the note, all of which is brought to the notice of your client, who is about to pay value for the note. He asks your advice as to whether the note is good or not under the circumstances disclosed. What would be your advice, and why?

396.

21. The income of an estate is devised to A until the birth of issue, upon the happening of which event, the income is to be divided between himself and the child. He has a child begotten and born out of wedlock. He thereafter marries the mother of the child, who seeks on its behalf to compel a division of the income as provided. What do you say as to the child's rights in the premises?

397.

22. A and B were husband and wife. They lived separate and apart by mutual agreement, the husband having the care and custody of X, an unmarried minor child, the sole issue of the marriage. The husband in and by his last will and tes-

tament, which was duly admitted to probate and recorded, appointed Y to be the general guardian of the person of the infant until it arrived at the age of twenty-one years. The widow consults you as to the validity of the appointment of the guardian. What do you say, and why?

398.

23. A sued B in contract to recover the price and value of certain goods, wares and merchandise sold and delivered to him by A. The complaint contained allegations of fraudulent misrepresentations on the part of the defendant as to his being of full age, and as to his responsibility, made to induce credit, that plaintiff sold on a credit and in reliance on such representations, as aforesaid, all of which were false. The defense was infancy. All of the above facts having been established on the trial of the action, both sides moved for judgment. Judgment for whom, and why?

399.

24. State the qualifications for voters for officers elective by the people.

400.

25. A was indicted and tried for robbery in the first degree. The jury acquitted him. Thereupon the district attorney, upon affidavits absolutely establishing misconduct and corruption on the part of the jury, moved to set aside the verdict and for a new trial. What should be the decision of the court on the motion, and for what reason?

# ANSWERS.

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## 1.

### ALBANY COUNTY COURT.

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JOHN DOE, Plaintiff.

*against*

RICHARD ROE, Defendant.

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The plaintiff complains of the defendant in the above-entitled action, and alleges:

I. That the above-named defendant is a resident of the county of Albany.

II. That on the .... day of ....., 190.., at the city of Albany, N. Y., the said defendant assaulted and beat the above-named plaintiff to his damage in the sum of \$2,000, for which sum he demands judgment against said defendant, with costs.

X Y,

Attorney for Plaintiff,  
Office and Post-office Address,

---

Albany, N. Y.

Section 340, Code of Civil Procedure.

## 2.

Judgment for plaintiff. A wins. Title not in issue.

"In an action of trespass on real estate the general rule is that possession thereof by plaintiff is sufficient to maintain the action against the wrongdoer, and that a general denial contained in the answer is not sufficient to put the plaintiff's title in issue."

Hill v. Water Comrs., 77 Hun, 492, at  
494, 495.

3.

Both. Both won; each party had recovered, and was entitled to costs as against the other.

Code Civil Procedure, sec. 3234.

Browning v. N. Y., L. E. & W. R. R. Co.,  
64 Hun, 513.

4.

B only. Judgment could not be rendered against C for the reason that no such judgment was prayed for in the complaint.

Bradley v. Shafer, 64 Hun, 428.

5.

(1) Draw summons and complaint and have latter verified.

(2) File notice of pendency of action in clerk's office of county where the mortgaged property is situated. (Code, sec. 1631.)

(3) File complaint in clerk's office of county where venue is laid.

(4) Serve summons and complaint on defendants.

(5) When time to answer has expired, none of the defendants appearing or answering or being infants or absentees, apply to Special Term upon an affidavit of regularity for an order of reference to compute the amount due to the plaintiff, and on such report apply to the court for judgment of foreclosure and sale.

Supreme Court Rules 60, 61.

6.

By procuring a writ of *habeas corpus* to bring up a person to testify.

Code Civil Procedure, sec. 1991; secs. 2008 to 2014.

7.

A's contention is correct.

B had originally a right of way of necessity over the lands

of A. It was not, however, a perpetual right of way; it continued only so long as the necessity existed, and when he obtained access to the highway across his own lands his right over A's land ceased. B must now cross his own land.

Palmer v. Palmer, 150 N. Y. 146, 147.

8.

That which was annexed to the land was real property and went to B, viz., the thirty acres of uncut hay and the posts distributed along the fences; the remainder, to wit: the fifty cords of wood, corded in the woods, and the twenty acres of hay which had been cut, being personal property (not annexed to the land) belonged to A.

Matter of Chamberlain, 140 N. Y. 390.

Bank v. Crary, 1 Barb. 542.

Warren v. Leland, 2 Barb. 619.

Bradner v. Faulkner, 34 N. Y. 347.

8 Am. & Eng. Encyc. of Law (2d ed.),  
p. 302.

Stall v. Wilbur, 77 N. Y. 158.

9.

A and his wife C did not become tenants by the entireties under the circumstances.

Gerard on Titles to Real Estate (4th ed.),  
p. 299.

Bertles v. Nunan, 92 N. Y. 152.

Zorntlein v. Bram, 100 N. Y. 15.

When A died, C, his wife, owned her own half; the child owned the other half subject to its mother's dower.

Sec. 170, Real Property Law (chap. 547,  
Laws 1896); Id., sec. 281.

10.

That the debt was barred by the six years' statute of limitations (Code Civil Procedure, sec. 382), and was not revived by the oral declaration and promise to pay (Id., sec. 395).

11.

'A has no remedy. A promise by one party to do that which he is already under a legal obligation to perform is insufficient as a consideration to support a contract.

Carpenter v. Taylor, 164 N. Y. 177.

12.

'A liable for \$40,000 only. This being a limited partnership under the statute (chap. 420, Laws 1897), A, the special partner, is not liable for the debts of the partnership beyond the fund contributed by him to the capital of the partnership, to wit, \$40,000. B, the general partner, is liable as such for the entire debt, *viz.*, \$100,000 (*Id.*, secs. 6, 7, 36).

13.

B, the survivor had the legal title to the assets; he held them as the legal owner, and not as trustee, except that in equity he would be regarded to some extent as a trustee; his duty was to pay the debts and dispose of the assets of the partnership for the benefit of himself and the estate of the deceased partner.

Russell v. McCall, 141 N. Y. 447.

Kastner v. Kastner, 53 App. Div. 293.

14.

Judgment for A. The instrument is not a promissory note, it not being certain that John Doe will ever become twenty-one years old; hence A's neglect to present the same for payment, its nonprotest and failure to give him notice did not discharge Roe, the maker.

Rice v. Rice, 43 App. Div. 458.

15.

Judgment for C for \$1,000. While there was a material alteration, C was a holder in due course and not a party to the alteration; he may enforce payment thereof according to its original tenor.

Negotiable Instruments Law (chap. 612, Laws 1897), secs. 205, 206.

Eaton & Gilbert on Com. Paper, pp. 556, 561, 678.

16.

X has no claim against the wife. "The marital relation creates, in itself, no presumption that the husband was agent for his wife, and proof of his appointment as such, or of her ratification, is necessary to bind her on contracts made by him in regard to repairing her real estate."

Aarons v. Klein, 29 Misc. 639.

17.

X, the agent, is personally liable.

An agent is personally liable upon a contract made for a principal not named by him, although he states to the contractor that he is not the owner of the premises where the work is to be done, but is merely the agent for the owner. Carpenter had option to sue either.

Nichols v. Weil, 30 Misc. 441.

Y was not called upon to inquire, it was X's duty to disclose his principal.

"A person, even though making an agreement for another, makes himself personally liable thereon if he contracts in his own name, without disclosing his principal, although the other party to the contract may suppose that he is acting as agent."

DeRemer v. Brown, 165 N. Y. 419.

Y was entitled to actual knowledge of the name of X's principal.

Cobb v. Knapp, 71 N. Y. 348.

18.

A, the surety, is not discharged.

"Mere indulgence by a creditor of the principal debtor will not discharge the surety. There must be an agreement for an extension made without the consent of the surety, upon a valid consideration, which ties the hands of the creditor and precludes him meanwhile from proceeding to collect the debt against the principal, thereby changing the position of the surety." None of those elements exist in the problem given.

Fifth National Bank v. Woolsey, 21  
Misc. 761, 762.

19.

B cannot recover. C's obligation as surety was *strictissimi juris*, and he is discharged by any alteration of the contract to which his guaranty applied, whether material or not, and the courts will not inquire whether it is or is not to his injury.

Page v. Krekey, 137 N. Y. 314.

Tradesmen's National Bank v. National  
Surety Co., 169 N. Y. 567.

20.

A can recover. He has an insurable interest in B's building. "A legal or equitable title is not necessary to give an insurable interest in property; if one has a right which may be enforced against the property, and which is so connected with it that injury thereto will necessarily result in a loss to him, he has an insurable interest."

Rohrbach v. Germania Fire Ins. Co., 62  
N. Y. 47.

Riggs v. C. M. Ins. Co., 125 N. Y. 14.

21.

Yes. A can recover.

"Where a creditor procures an insurance upon the life of his debtor, his insurable interest continues, although the statute of limitations would have barred his action, if pleaded, before the debtor's death. A contract for life insurance is not one for indemnity merely, and if the insured had an interest in the duration of the life when he took the policy, he may recover, though that interest has ceased."

Rawls v. Am. Mut. Life Ins. Co., 27  
N. Y. 282.

Richards on Insurance, sec. 27.

22.

No; owner cannot recover. The picture perished without any fault of the hirer so that redelivery became impossible; the Art Association is excused.

Young v. Leary, 135 N. Y. 576.

23.

The attachment should be vacated as to the horse-feed. The transaction was a bailment, not a sale, and title thereto was in the farmer.

Sattler v. Hallock, 160 N. Y. 291.

24.

Yes. The warranty being express, survived acceptance.

Fairbanks Canning Co. v. Metzger, 118 N. Y. 260.

Hooper v. Story, 155 N. Y. 171.

Zabriskie v. C. V. R. R. Co., 131 N. Y. 72.

The measure of damages is the difference between the contract price of the goods and their market value at the time and place of delivery. The buyer is entitled to the benefit of his bargain in obtaining the goods at a price below their real value.

Comstock v. Hutchinson, 10 Barb. 211.

Windmuller v. Pope, 107 N. Y. 674.

Ideal Cash Reg. Co. v. Zunino, 39 Misc. 311.

25.

The action will be in fraud. The damages will be the value of the sheep which died and the diminished value of the sheep infected by the disease which did not die.

Jeffrey v. Bigelow, 13 Wend. 518.

26.

The Court should exclude the evidence.

The declarations of the motorman one hour after the accident, with respect to the cause and circumstances of the accident, were not binding upon the defendant, and are inadmissible against it, where they do not tend to contradict or impeach the motorman in anything to which he testified as a witness for the defendant.

Kay v. Met. Street Ry. Co., 163 N. Y.

## 27.

The judgment should be reversed.

The negligence of the defendant in other cases did not justify a recovery by the plaintiff; the evidence was clearly improper.

Lichtenstein v. Jarvis, 31 App. Div. 36,  
37.

## 28.

Yes, the exception was well taken.

A witness can only be impeached by evidence of general character; evidence of particular reports or of specific offenses is inadmissible except as brought out on cross-examination, as showing foundation of bad character.

Abbott's Trial Evidence (1st ed.), p. 674.

In this case the witness denied the theft; it being collateral matter not involved in the issue, the party who called it out was bound by it and could not contradict it.

*Vide* cases cited, Vol. 13, Abb. Cyc. Dig., p. 938, par. 4; also question 33 *infra* and answer.

## 29.

Yes. A was a witness to the will.

"The opinion of a witness, not an expert, as to the mental condition of another, is not competent, save in the case of a subscribing witness to a will, although based on what the witness himself saw or heard."

Holcomb v. Holcomb, 95 N. Y. 316.  
Clapp v. Fullerton, 34 N. Y. 190.

## 30.

Yes.

Upon the trial of an action for a breach of promise of marriage, evidence of defendant's general reputation, as to wealth, is competent upon the question of damages.

Chellis v. Chapman, 125 N. Y. 214.  
Kniffen v. McConnell, 30 N. Y. 285.

## 31.

Guilty of the crime of an attempt to commit arson. A with felonious intent to commit the crime of arson did an act tending to effect its commission; his failure to complete it made him guilty of an attempt.

Penal Code, secs. 488, 34, 171.

5 Park. Crim. Rep. 102.

James McDermott v. People, 5 Park. Crim. Rep. 102.

## 32.

Not guilty. A's marriage to C while B was living was bigamous and void. When B died, he had no lawful wife living, hence his marriage to D was valid.

Penal Code, sec. 298.

## 33.

No. A witness can only be impeached by evidence of general character; evidence of specific offenses is inadmissible.

Abbott's Trial Evidence (1st ed.), p. 674.

Doe was indicted for assault upon A; it was not material to the issue that at another time and place he feloniously broke into the house of B, so that the prosecution was not only bound by the answer, but the evidence was also inadmissible for the reason that it tended to prove the commission of another crime, which had no possible relevancy to the issue.

People v. Van Tassell, 156 N. Y. 561.

People v. Molineaux, 168 N. Y. 343.

People v. Place, 157 N. Y. 585, 598.

*Vide* question 28 and answer, *supra*.

## 34.

Yes, not on the note, however, but in fraud for the fraudulent concealment of a material fact.

Brown v. Montgomery, 20 N. Y. 287.

Rothmiller v. Stein, 143 N. Y. 593.

35.

Judgment for the master.

"In order to charge a master with liability to one servant, for the acts of an alleged incompetent fellow servant, the proper course is to show specific acts of incompetency on the part of the servant, and that the master knew, or should have known, of such incompetency." The problem given does not show the latter fact.

McCarthy v. Ritch, 59 App. Div. 145.

36.

'A can sue B in conversion or he can waive the tort and sue in contract for the value of the rye.

"Where one of several tenants in common of a farm (all being of full age) occupies it with the acquiescence of his cotenants, and, in the usual course of husbandry, takes the annual products thereof, without having entered into any contract in respect to its use and without having ousted, or denied the right of, any of his cotenants, he is not liable to account to them for its use, or for the products so taken."

Le Baron v. Babcock, 122 N. Y. 153.

Felts v. Collins, 46 App. Div. 334.

Ferris v. Nelson, 60 App. Div. 430.

Terry v. Munger, 121 N. Y. 161.

37.

The will was properly executed.

(a) It was not necessary for the testator to sign in the presence of both the witnesses at the same time, nor for the witnesses to be both present when the testator published and acknowledged the same.

Willis v. Mott, 36 N. Y. 486. \*

Baskin v. Baskin, 36 N. Y. 416.

Hoysradt v. Kingman, 22 N. Y. 372.

(b) An attestation clause is not necessary.

Redfield's Law & Practice, Surrogates' Courts (6th ed.), pp. 157, 158, sec. 203.

Matter of Crane, 68 App. Div. 355.

Matter of Cornell, 89 App. Div. 412.

(c) It is not necessary for the witnesses to give their respective places of residence.

*Id.*, pp. 154-155, sec. 200.

Dodge v. Cornelius, 168 N. Y. 244.

Matter of Phillips, 98 N. Y. 267.

38.

The estate, being all personal, goes to the husband by virtue of his marital right, the wife dying intestate and without descendants.

Matter of Thomas, 33 Misc. 730.

39.

Valid, except that the surplus income accumulated during John's infancy belongs to him when he arrives at the age of twenty-one years and should be paid to him then.

Pray v. Hagaman, 92 N. Y. 508.

Hascall v. King, 162 N. Y. 138.

40.

The Court will decree that the owner reimburse A, the occupant, for his expenditures.

He who seeks equity must do equity.

Thomas v. Evans, 105 N. Y. 601.

41.

Yes. He has an action in equity to enforce a resulting trust and is entitled to the proceeds of the policy to the amount of his debt.

Holmes v. Gilman, 138 N. Y. 369.

Matter of Hicks, 170 N. Y. 198, 200, 201.

42.

'A loses his horse. He is estopped from asserting his title.

"An estoppel may arise from silence, as well as words; but this is only where there is a duty to speak, and the party upon whom the duty rests has an opportunity to speak, and, knowing the circumstances requiring him to speak, keeps silent; or, in other words, where his silence amounts to a fraud, actual or constructive."

Vol. XI, Encyc. of Law (2d ed.), pp. 427,  
428, 429.

43.

'A wins.

Bank cannot recover. 'A is the absolute owner of the stock; the contract is *ultra vires* and purely executory.

Nassau Bank v. Jones, 95 N. Y. 115.

44.

The consolidated corporation is liable for the debts of each of the constituent companies, but the equitable lien which the creditors of the X Railroad Company has on the property of their solvent debtor, preserves its validity and priority as against the other creditors.

Prouty v. Lake S. & Mich. S. R. Co., 52  
N. Y. 363.

Boardman v. L. S. & M. S. R. R. Co., 84  
N. Y. 181.

Copp v. C. C. & I. Co., 29 Misc. 110.

45.

No. 'A holds the real estate, having purchased in good faith and for value.

Cole v. M. I. Co., 133 N. Y. 168.

46.

'A can be compelled to support his wife, his minor son, and his paternal and maternal grandparents, by the Overseer

or Superintendent of the Poor or Commissioner of Charities.

*Ex parte Hunt*, 5 Cow. 284.  
Code Crim. Pro., secs. 914-926.

47.

The marriage is valid and the child is legitimate. The second marriage is voidable, but only void from the time its nullity is declared by a court of competent jurisdiction. Bring an action to annul the second marriage.

Domestic Relations Law (chap. 272, Laws 1896), secs. 3, 4.  
Code Civil Procedure, secs. 1742-1755.  
Code Crim. Procedure, sec. 838.  
*Price v. Price*, 124 N. Y. 589.

48.

No, A cannot recover; he should have obtained an order of the Court authorizing the expenditure.

*Hassard v. Rowe*, 11 Barb. 22.

49.

The lease is valid. The provision of the Constitution of the State of New York (art. I, sec. 13) prohibiting the leasing or granting of agricultural lands for a longer period than twelve years, is not violated by a lease for mining purposes such as is set forth in the question.

*Massachusetts Nat. Bank v. Shinn*, 163 N. Y. 360.

50.

The act is unconstitutional and void.

(a) It is a private or local bill and embraces more than one subject. Const. of N. Y., art. III, sec. 16.

(b) It is a private or local bill discontinuing a highway. Id., art. III, sec. 18.

(c) It is a bill allowing a private claim or account against the state. Id., art. III, sec. 19.

## 51.

## SUPREME COURT, NEW YORK COUNTY.

JOHN DOE, Plaintiff,

*against*

RICHARD ROE, Defendant.

The plaintiff complains of the above-named defendant and alleges:

That heretofore the defendant made his promissory note in writing, dated on the .... day of ...., 190.., at New York city, and thereby promised to pay to the plaintiff or his order one hundred dollars, three months after said date. That no part of said note has been paid.

Wherefore plaintiff demands judgment against said defendant for one hundred dollars with interest thereon from the .... day of ...., besides the costs of this action.

X Y Z,  
Plaintiff's Attorney.

Office and Post-office Address,

\_\_\_\_\_, Albany, N. Y.

## 52.

"The affidavit, to be delivered to the Sheriff, as prescribed in the last section, must particularly describe the chattel to be replevied, and must contain the following allegations:

1. That the plaintiff is the owner of the chattel, or is entitled to the possession thereof, by virtue of a special property therein; the facts with respect to which must be set forth.
2. That it is wrongfully detained by the defendant.
3. The alleged cause of the detention thereof, according to the best knowledge, information and belief of the person making the affidavit.
4. That it has not been taken by virtue of a warrant, against the plaintiff, for the collection of a tax, assessment or fine, issued in pursuance of a statute of the State, or of the United States; or, if it has been taken under color of such

a warrant, either that the taking was unlawful, by reason of defects in the process, or other causes specified, or that the detention is unlawful, by reason of facts specified, which have subsequently occurred.

5. That it has not been seized by virtue of an execution or warrant of attachment, against the property of the plaintiff or of any person from or through whom the plaintiff has derived title to the chattel, since the seizure thereof; or, if it has been so seized, that it was exempt from the seizure, by reason of facts specified, or that its detention is unlawful, by reason of facts specified which have subsequently occurred."

Sec. 1695, Code of Civil Procedure.

"Where the affidavit describes two or more chattels of the same kind, it must state the number thereof, and where it describes a chattel in bulk, it must state the weight, measurement, or other quantity. Where it describes two or more chattels to be replevied, it may, at the election of the plaintiff, state the aggregate value of all; or, separately, the value of any chattel or of any class of chattels, and the aggregate value of the remainder, if any. Where it states separately the value of one or more chattels or classes of chattels, the defendant may require, as prescribed in the following provisions of this article, the return of any or all of the chattels or classes of chattels, the value of which is thus stated, or of the portion thereof which has been replevied. If he procures such a return, the remainder must be delivered to the plaintiff, except as is otherwise prescribed in this article."

Sec. 1697, Code Civ. Proc.

53.

The Court denied defendant's motion.

"If the defendant, in an action for breach of a contract within the statute (of frauds), desires to avail himself of the benefit of the statute, he must plead it. If the defect appears on the face of the complaint, the defense must be interposed by demurrer (Code Civ. Proc., sec. 488); if it does not so appear, it must be presented by answer. If the objection is

not taken either way, defendant will be deemed to have waived it."

Crane v. Powell, 139 N. Y. 379.

C. R. Parmele Co. v. Haas, 171 N. Y.  
583.

Barrett v. Johnson, 77 Hun, 527.

54.

By an order requiring him to produce or by a subpoena *duces tecum*. The subpoena must be served at least five days before the day when he is required to attend.

Code Civ. Proc., sec. 867.

55.

The appellate tribunal should reverse the decision of the trial court. The answer having admitted plaintiff's cause of action, he was not required to give any evidence to be entitled to a verdict, and hence he did not have the right to begin by opening the case to the jury and adducing his evidence first. The right to open and close is a substantial one, and it is error to refuse it to the one entitled, who, in the case given, was the defendant.

*Vide Abbott's Trial Brief (Civil Jury Trials)*, pp. 30, 38, and cases cited.

56.

Plaintiff is entitled to issue an execution, of course, at any time within five years after the entry of judgment, and if he issued one during that time he can issue another, of course, in 1903, provided the ones already issued have been returned wholly or partly unsatisfied or unexecuted. If he did not within the five years from the entry of judgment issue an execution, as aforesaid, he cannot issue an execution without an order of the Court granting leave to issue the same.

Code Civ. Proc., secs. 1375, 1377, 1378.

57.

Advise your client to put his mortgage on record and then start an action in equity to have it declared a lien prior to

'A's deed. The latter, because of his having purchased for an antecedent debt, is not a purchaser for a valuable consideration, as required by the Real Property Law.

Real Property Law (chap. 547, Laws 1896), sec. 241.

*Vide* numerous cases cited, Logan's Real Property Law, p. 87.

De Lancey v. Stearns, 66 N. Y. 157.

Howells v. Hettrick, 160 N. Y. 308.

58.

Advise the tenant that the engine is a trade fixture, and that as he can remove it without injury to the premises, and intends to replace the old engine where he found it, he is at liberty to do so, within his term, notwithstanding the landlord's objection. It is his property and not the landlord's.

Andrews v. D. B. Co., 132 N. Y. 353.

59.

The inheritance shall descend to them in equal parts, each one-quarter, for they are all of equal degree of consanguinity to their grandfather from whom it came.

Real Property Law (chap. 547, Laws 1896), secs. 281, 282.

60.

'A wins. B volunteered and paid the debt without A's privity or consent; the moral obligation of A to reimburse him was not a sufficient consideration to uphold his promise to do so.

*Vide*, generally, 9 Cyc. Law & Proc., pp. 316, 356.

Bartholomew v. Jackson, 20 Johns. 28.

61.

'Y is not liable. The contract is void as a wagering contract.

Kingsbury v. Kirwan, 77 N. Y. 612.

Embery v. Jemison, 131 U. S. 336.

62.

A cannot recover.

He knew that X was a miller and he sold and shipped to him the lumber individually and took his note therefor. He took partnership security from one of the partners for what he knew at the time to be the particular debt of the partner who gave it, and he cannot recover thereon, especially where the transaction (the buying of lumber) is not within the scope of the milling business to which the partnership was specially limited.

*Livingston v. Roosevelt*, 4 Johns. 251, 252.

63.

B wins.

"After the dissolution of a partnership an acknowledgment and promise to pay, made by one of the partners, will not revive a debt against the firm which is barred by the statute of limitations."

*Van Keuren v. Parmelee*, 2 N. Y. 523.

*Murdock v. Waterman*, 145 N. Y. 63.

*Conn. Trust Co. v. Wead*, 33 Misc. 376.

64.

Yes. E has a cause of action against D. D, by his indorsement, warranted that the note was genuine and in all respects what it purported to be. The use of the words "without recourse" simply qualified his indorsement as to his financial responsibility but did not relieve him of his warranty as to the validity of the prior indorsements.

Nego. Ins. Law (chap. 612, Laws 1897),  
sec. 115.

Eaton & Gilbert on Com. Paper, sec. 85,  
p. 418.

Daniel on Nego. Inst. (5th ed.), sec. 675.

65.

C can recover against A.

He derived his title through a holder in due course, and

not being a party to any fraud or illegality affecting the instrument, he has all the rights of such former holder in respect of all parties prior to the latter.

Nego. Inst. Law (chap. 612, Laws 1897),  
sec. 97.

Eaton & Gilbert on Com. Paper, pp. 387,  
388.

Daniel on Nego. Inst. (5th ed.), secs. 803,  
805.

4 Am. & Eng. Encyc. of Law (2d ed.), p.  
308.

### 66.

Yes, C can recover.

A was an undisclosed principal, and C had the right to resort to him when he learned the facts.

1 Am. & Eng. Encyc. of Law (2d ed.),  
p. 1139.

### 67.

Yes. A can recover. B was acting within the scope of his authority and in the business of his principal when he gave to A the false information on which he relied to his damage.

City Nat. Bank of Birmingham v. Dun,  
51 Fed. Rep. 160.

### 68.

Judgment for C.

A is estopped from denying B's capacity to contract.

Penfield v. Goodrich, 10 Hun, 43.  
Kimball v. Newell, 7 Hill, 116.

### 69.

Both have good defenses.

The release of A discharged both B and D.

Robertson v. Smith, 18 Johns. 459.  
King v. Baldwin, 2 Johns. Ch. 559.

## 70.

To the first wife. Her interest was fixed at the time the policy was issued.

Steinback v. Diepenbrock, 158 N. Y. 30.  
 Conn. Mut. v. Schaefer, 94 U. S. 457.  
 Goldsmith v. Union M. L., 15 Abb. N. C. 409.

## 71.

## Judgment for B.

The policy was void for breach of condition, the knowledge of the agent was the knowledge of the defendant insurance company.

Van Schoick v. Niagara F. Ins. Co., 68 N. Y. 434.  
 Contra (in U. S. courts), Northern Ass. Co. v. Grand View Building Assoc., 183 U. S. 308.

## 72.

The hostler was negligent and caused the injury; he is liable, so is the landlord.

B is also responsible, he made the hostler his agent or servant, and is liable for his negligence under the circumstances.

Hall v. Warner, 60 Barb. 198.

## 73.

A and B were bailor and bailee, and the transaction was a bailment.

When B, the boarding-stable keeper, hitched one of the horses to drive on his own business without A's knowledge or consent, his liability for injury to the horse, while so driving, was absolute and not dependent upon his want of care. He is liable for the value of the horse killed while out driving.

5 Cyc. Law & Proc., title "Bailment," pp. 176, 177, 178.

The bailment was for "mutual benefit," and the boarding-stable keeper is held to the exercise of ordinary care in rela-

tion to the subject-matter and is responsible only for ordinary negligence, while not going beyond his trust, which, under the circumstances narrated, is that care which a man of ordinary prudence and discretion would use in reference to the particular thing, were it his own property, or in doing the particular thing were it his own concern. (Id., pp. 182, 183, 184.) The fire which destroyed A's horses occurred without B's fault or negligence, and killed his own as well as A's, hence he is not liable to A for the value of the burned horse.

#### 74.

The sale having been induced by fraud on the part of A, B could repudiate the transaction and reclaim and retake the goods from the possession of any one, except a transferee in good faith and for a valuable consideration paid at the time of the transfer.

A, having purchased the goods for an antecedent debt, was not a purchaser for a valuable consideration paid at the time of the transfer.

B can replevin or demand a return of the goods and on refusal sue in conversion or for their value.

*Stevens v. Brennan*, 79 N. Y. 254.

*Button v. Rathbone*, 126 N. Y. 192.

*Terry v. Munger*, 121 N. Y. 161.

#### 75.

Judgment for A. The fact that the agent had no express authority to make the warranty is immaterial. Upon a sale by sample, of goods *in esse*, there is an implied warranty that the goods shall correspond with the sample.

*Waring v. Mason*, 18 Wend. 425.

*Hargous v. Stone*, 5 N. Y. 73.

*Smith v. Coe*, 170 N. Y. 171.

*Gurney v. At. & G. W. R. Co.*, 58 N. Y. 364.

#### 76.

The Court should admit the testimony.

"It was pertinent and not immaterial. The (Engineer's)

authority to act for the defendant in relation to the stone was in issue; it might be established by circumstances, and among others the recognition by the defendant of acts on his part similar to those in controversy."

Beattie v. D., L. & W. R. Co., 90 N. Y.  
643.

77.

The Court should exclude the testimony, as being parol evidence to vary, contradict and alter a written agreement.

Johnson v. Oppenheim, 55 N. Y. 293.

78.

The Court should exclude the testimony.

Hearsay evidence on questions of pedigree is not admissible unless the party who made the declarations is dead. There was no proof offered that the father of B is dead.

Stephen's Dig. Law Ev. (Beers' N. Y.  
ed.), p. 157.  
People v. Miller, 30 Misc. 355.

79.

"A husband or wife is not competent to testify against the other upon the trial of an action, or the hearing upon the merits of a special proceeding founded upon an allegation of adultery, except to prove the marriage or disprove the allegation of adultery."

Code Civ. Proc., sec. 831.

80.

The objection should be overruled.

The witness being competent and having personally inspected the bridge immediately after the accident, his knowledge was derived from his own observations and he may be asked his opinion directly upon the fact.

Abbott's Brief on Facts, p. 229.

81.

Murder in the first degree.

It is murder in the first degree to kill a human being when committed without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise.

Penal Code, sec. 183.

People v. Cole, 2 N. Y. Crim. Rep. 108.

Fitzgerald v. People, 37 N. Y. 413.

People v. Flanagan, 174 N. Y. 356.

People v. Greenwall, 115 N. Y. 520.

82.

Yes. In all cases, other than felony, defendants jointly indicted may be tried separately or jointly in the discretion of the court.

Code Crim. Proc., sec. 391.

83.

C was guilty of petit larceny.

A committed a misdemeanor when he feloniously stole in the day time, as stated, an overcoat of the value of ten dollars. C, who thereafter aided A to escape from arrest, knowing at the time that he was liable to arrest, became a principal to the crime and could be indicted and punished as such.

Penal Code, secs. 532, 30, 31.

84.

Yes. Assault.

"The menace of violence with a dangerous weapon by a person within striking distance of the party menaced is an assault, although the person menaced is not actually struck, and damages may be recovered for such assault."

Liebstadter v. Federgreen, 80 Hun, 245.

85.

Upon A.

It was immaterial under the circumstances whether A's ox was known to be vicious or not, when it gored B's ox

through the fence, which separated the farms. The fence being proper, it committed a trespass for which A is liable.

Van Leuvin v. Lyke, 1 N. Y. 515.

Marsh v. Hand, 120 N. Y. 319.

86.

No.

"A person cannot place himself in a position of danger simply for the protection of his property \* \* \* without being guilty of such negligence as will preclude a recovery for a personal injury in so doing."

Morris v. Railway Co., 148 N. Y. 182.

87.

C, D and E each take one-third or four thousand dollars. A's right of inheritance and succession from his natural parents remained unaffected by his adoption, but his parent D stood toward him in the legal relation of parent and child and inherited from him as such.

Dom. Rel. Law (chap. 272, Laws 1896),  
sec. 64.

Code Civ. Proc., sec. 2732.

88.

The widow has her election and can claim dower in either estate, provided she evinces her election by the commencement of an action to recover her dower in the lands given in exchange within one year after the death of her husband, if not, she will be deemed to have elected to take her dower in the lands received in exchange.

Real Property Law (chap. 547, Laws 1896), sec. 171.

89.

Mary wins. The will was valid as a nuncupative will of a soldier in actual service, and *in extremis* dying on the field of

battle. Its execution and tenor can be established by at least two witnesses.

Prince v. Hazelton, 20 Johns. 502.  
*Ex parte* Thompson, 4 Bradf. Surr. 154.  
Code Civ. Proc., sec. 2618.  
Redfield's Surr. Pr. (6th ed.), p. 201,  
sec. 240.  
2 R. S. 60, sec. 22.  
Hubbard v. Hubbard, 8 N. Y. 190.

90.

Judgment for B. Equity will not interfere with a bad bargain, if there was no disability or fraud.

1 Story's Eq. Jurisp. (12th ed.), sec. 244.

91.

Yes. They can bring an action in equity to have the property purchased by A impressed with the original implied trust so as to hold the same for the benefit of the children including himself. The last piece of property A purchased with the proceeds of the sale of the house the mother deeded to him under their agreement, and it stands in the place thereof. The trust grows out of the facts, founded upon the confidential relation of mother and son, brothers and sisters.

Goldsmith v. Goldsmith, 145 N. Y. 313.  
Wood v. Rabie, 96 N. Y. 425.  
Ahrens v. Jones, 169 N. Y. 561.  
Hunt v. Hunt, 171 N. Y. 401.  
McClellan v. Grant, 83 App. Div. 603.

92.

C cannot get rid of the mortgage without paying or offering to pay the sum actually loaned. He is not a borrower within the meaning of the provisions of the usury law (sec. 4, chap. 430, Laws 1837), declaring such payment or offer to be unnecessary as a condition of granting relief to a borrower.

Buckingham v. Corning, 91 N. Y. 525.  
Hubbard v. Todd, 171 U. S. 474.

## 93.

The judgment is invalid. B, the president, well knowing the insolvency of the corporation, procured his wife to institute suit and to recover judgment; the judgment was procured or suffered through the actual agency of an officer of the company contrary to the provisions of section 48 of the Stock Corporation Law, chapter 564, Laws 1890, as amended by Laws 1892, chapter 688.

Dickson v. Maye, 35 St. Rep. 482.

## 94.

The X Company is not liable. It is an *ultra vires* act for a corporation organized for the purpose of manufacturing beer and malt to become an accommodation surety for the payment of the rent of a house which one of its directors rented of A, and A was bound to know in that regard the limitations on the corporate powers.

Jemison v. C. S. Bank, 122 N. Y. 135.

10 Cyc. 1148 *et seq.*

Nat. Park Bank v. G. A. M. W. & S. Co.,  
116 N. Y. 281.

*Vide* as to its being surety on leases of saloons, Koehler v. Reinheimer, 26 App. Div. 1; Aaronson v. David Myer B. Co., 26 Misc. 655; *Idem*, on appeal, 29 Misc. 289; Holin v. Claus, 21 App. Div. 204; 66 A. D. 522.

## 95.

The directors of a stock corporation shall not make dividends except from the surplus profits arising from the business of such corporation. Each of the directors who voted to borrow \$50,000 on the notes of the corporation is jointly and severally liable to such corporation and to the creditors thereof to the full amount of any loss sustained by such corporation or creditors respectively by reason of such act. The two directors who dissented are not liable, provided they caused

their dissent to be entered at large upon the minutes of such directors at the time or were not present when it happened.

The Stock Corporation Law (chap. 564, Laws 1890), as amended by Laws 1892, chap. 688, sec. 23.

96.

To the wife, \$5,000; to the creditors, \$2,500.

A married woman to whom a policy on the life of her husband is made payable, when she survives, is entitled to receive the insurance money payable by the terms of the policy as her separate property, and free from any claim of a creditor or representative of her husband, except that where the premiums actually paid annually out of the husband's property exceeds \$500, that portion of the insurance money which is purchased by excess of premiums above \$500, is primarily liable for the husband's debts.

Dom. Rel. Law (Laws 1896, chap. 272),  
sec. 22.

97.

The marriage of B and C legitimatized A, and he became entitled to all the rights and privileges of a legitimate child.

Dom. Rel. Law (Laws 1896, chap. 272),  
sec. 18.

The real estate descended to A subject to his mother's dower. (Real Prop. Law, chap. 547, Laws 1896, sec. 281.)

The personal estate was distributed one-third to the mother and the balance to A. (Code Civ. Proc., sec. 2732.)

X, the father of the deceased, took nothing.

98.

He has neither duty nor liability. The debt was contracted after the marriage. He is liable for his wife's debts contracted before marriage to the extent of the property of his wife which he acquired by antenuptial contract or otherwise.

Dom. Rel. Law (Laws 1896, chap. 272),  
sec. 24.

## 99.

The act is unconstitutional. It is an unlawful interference with and abridgment of the liberty of the citizen in that it prevents him from engaging in the business of selling passage tickets on steamboats and railroad trains, the business being perfectly lawful, innocent and harmless.

*Vide* 168 N. Y. 671; 173 N. Y. 211; 83 App. Div. 201.

It transcends the police power and violates the constitutional guarantees of civil rights and privileges and of liberty (Const., art. 1, secs. 1-6).

People ex rel. Tyroler v. Warden, 157 N. Y. 116.

Dodge v. Cornelius, 168 N. Y. 251.

## 100.

'Advise the abutting owners to commence action and procure an injunction restraining the construction and operation of the road, on the ground that it deprives them of property without due process of law (the owners having title to the center of the street) in violation of section 6, article 1, of the Constitution of the State, and as being in violation of section 18, article 3 thereof, which states that "No law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property-owners cannot be obtained, the Appellate Division of the Supreme Court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property-owners."

## 101.

STATE OF NEW YORK, }  
CITY AND COUNTY OF ALBANY, } ss.:

A B, being duly sworn, deposes and says, that he is the attorney for the plaintiff herein.

That the foregoing complaint is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

That this action is founded upon a written instrument for the payment of money only, now in deponent's possession, which instrument is the source of deponent's information, and the grounds of his belief are (here set forth the grounds of your belief as to all matters not stated upon your knowledge, and the reason why the verification is not made by the party).

(Signed)                  A B.

Sworn to before me, this .....

day of ....., 190...

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Notary Public,  
Albany County, N. Y.  
Code Civ. Proc., secs. 525, 526.

## 102.

Deliver, at once and before the statute of limitations intervenes, the summons to the sheriff of the county where B resides, with intent that it shall be actually served on B. If the sheriff serves it on B, or the first publication of the summons as against B, pursuant to an order for service upon him in that manner is made, within sixty days after the expiration of the time limited for the actual commencement of the action, the action will be deemed to have been commenced against B, within the meaning of each provision of the Code of Civil Procedure, which limits the time for commencing an action.

Code Civ. Proc., sec. 399.

103.

An injunction order is an order issuing out of the Supreme Court restraining the commission or continuance of an act, the commission or continuance of which, during the pendency of the action, would produce injury to the plaintiff, or requiring a person to do or to refrain from doing a particular thing.

Code Civ. Proc., sec. 603.

Am. & Eng. Encyc. of Law (2d ed.),  
Vol. XVI, p. 342.

It may be granted in an action:

(1) "Where it appears, by affidavit, that the defendant, during the pendency of the action, is doing, or procuring or suffering to be done, or threatens or is about to do, or to procure, or suffer to be done, an act, in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, an injunction order may be granted to restrain him therefrom."

(2) "Where it appears, by affidavit, that the defendant during the pendency of the action, threatens or is about to remove, or to dispose of his property, with intent to defraud the plaintiff, an injunction order may be granted, to restrain the removal or disposition."

Code Civ. Proc., sec. 604.

104.

No. A false answer is not a sham answer, nor a sham defense which may be stricken out by the Court upon motion.

Code Civ. Proc., sec. 538.

Wayland v. Tysen, 45 N. Y. 281.

Thompson v. Erie R. R. Co., 45 N. Y.  
468.

105.

Exhibit the original subpoena to the witness, and, at the same time, deliver to him in person, which must be at least five days before the day when he is required to attend, a copy.

of the subpoena or a ticket containing its substance, and paying to him fifty cents for each day's attendance and eight cents for each mile going to the place of attendance.

Code Civ. Proc., secs. 852, 867, 3318.

106.

Six.

Code Civ. Proc., sec. 1176.

107.

The tenant has no remedy under the circumstances. The rain leaked through on the tenant's stock, directly under the leaky skylight, for several days.

"The tenant was not justified in creating or adding to such damage by leaving his property where he knew it would be subjected to the injury complained of. The measure of damages would be the difference in the rental value as they were, and would have been in a proper state of repair. (Drago v. Mead, 30 App. Div. 258.) But a lessee, knowing that his property, if left upon the premises, will be exposed to injury by a failure of the lessor to repair, has no right to take the hazard, and if he does, and his property is injured, he cannot recover of his lessor therefor."

Huber v. Ryan, 57 App. Div. 37.

108.

C has no right. The sheriff can sell.

B has an absolute power of disposition of the estate for his own use, and it is not accompanied by a trust. Such an estate is deemed a fee absolute in respect to the rights of creditors, purchasers and incumbrancers, and when the power of absolute disposition is executed, or the property is sold for the satisfaction of debts, future estates limited thereon are cut off.

Real Property Law (chap. 547, Laws 1896), sec. 129.

109.

The trust is valid. The absolute power of alienation is not suspended for any time, nor for any number of lives,

because there is a person in being, to wit: the executor, by whom an absolute fee in possession can be conveyed at any time, for the purposes of declaring the trust at end, and making immediate distribution of the proceeds thereof in the manner provided in the will.

Real Property Law (chap. 547, Laws 1896), sec. 32.

Sawyer v. Cubby, 146 N. Y. 192.

110.

Judgment for B. There was no consideration for B's promise, and it created no obligation against him, even though in writing.

Field's Lawyers' Brief, sec. 100.

Mills v. Wyman, 3 Pick. 207.

111.

B wins. The promise of C arose out of a new consideration, and was not within the statute of frauds, and having been adopted by B, the latter can maintain an action thereon against C.

Farley v. Cleveland, 4 Cow. 432.

Cleveland v. Farley, 9 Cow. 639.

Lawrence v. Fox, 20 N. Y. 268.

112.

The firm is not liable on the note. It was given by one of the partners in payment of his individual debt to and with the knowledge of C, and without the knowledge of the other members of the firm, or their subsequent assent.

Laverty v. Burr, 1 Wend. 529.

113.

'Advise A that an action will not lie, at law, to recover the amount he claims. One partner cannot sue another partner to recover alleged profits, unless there has been a settlement of accounts, a balance struck and an express promise to pay.

Westerlo v. Evertsen, 1 Wend. 532.

Belanger v. Dana, 52 Hun, 39.

Carey v. Brush, 2 Caines, 293.

114.

A wins.

C, the indorser, before the maturity of the note personally requested the holder of the same to let it run for another year, and the latter consented on the express agreement of C to "let his name be on it and let it be as it was." C thereby waived demand and notice.

"The indorser of a promissory note may, before maturity, waive, either verbally or in writing, demand and notice of nonpayment; the waiver may result from implication or usage, or from any understanding between the parties which satisfies the mind that a waiver was intended."

Cady v. Bradshaw, 116 N. Y. 188.

115.

Judgment for A.

"A promissory note payable on demand, whether with or without interest, is due forthwith, and an action thereon against the maker is barred by the statute of limitations, if not brought within six years after its date."

Wheeler v. Warner, 47 N. Y. 519.

Knapp v. Greene, 79 Hun, 266.

Eaton & Gilbert on Com. Paper, p. 447.

113.

Judgment for B. C was B's agent for the purposes of the loan and his knowledge was B's knowledge until A colluded with C to defraud B.

"The rule which charges a principal with the knowledge of his agent is for the protection of innocent third persons. If a person colludes with an agent to cheat the principal, the latter is not responsible for the act or knowledge of the agent."

National Life Ins. Co. v. Minch, 53 N. Y.

144.

117.

Judgment for the passenger.

The company is liable for any injury inflicted by its servant, when not acting within the scope of his employment,

while engaged in performing a duty which the carrier owes to the passenger.

Stewart v. Brooklyn & Crosstown R. R.  
Co., 90 N. Y. 588.

### 118.

A is released by the valid extension granted.

“Where a partnership is dissolved and one partner takes the partnership property and agrees to pay the partnership debts, as between himself and his former partner, he thereby, as to those debts, becomes the principal debtor, while the retiring partner occupies the relation of surety only (Savage v. Putnam, 32 N. Y. 501; Morss v. Gleason, 64 id. 204; Colegrove v. Tallman, 67 id. 95), and when such an arrangement is fairly and fully brought to the knowledge of a creditor of the firm, he is bound to respect the rights of his debtor, who thus becomes a surety, and thereby acquires the right of protection as such. (Palmer v. Purdy, 83 N. Y. 144; Grow v. Garlock, 97 id. 81; U. S. N. Bank v. Underwood, 2 App. Div. 342.)”

Reed & Barton v. Ashe, 18 App. Div.  
502, 503, 504.

### 119.

Yes. C is not liable.

“A surety is prejudiced by the risk assumed by the non-disclosure of the fact that the principal, for want of integrity, is not entitled to confidence in the relation which his surety is induced to assume to him; such concealment is deemed fraudulent, and everything short of that is insufficient to avoid the obligation of the surety.”

Ludekens v. Pscherhofer, 76 Hun, 548.

### 120.

The wife had a vested interest in the policy at the moment of its delivery to the husband; he had no authority without her assent to surrender the same and she can recover the

amount of the policy less the unpaid premiums with interest thereon.

Whitehead v. N. Y. Life Ins. Co., 102  
N. Y. 143.

121.

The insurance company is liable.

"A policy for a long period upon goods in a retail shop, applies to the goods successively in the shop, from time to time."

During the two months' vacation "the effect of the policy as an indemnity was suspended, not from any vice in the policy but from the absence of a subject for it to act upon \* \* \* yet the policy still continued to be a valid subsisting contract in the hands of the insured, and had they subsequently purchased the same goods or other goods and brought them into the store they would have been covered by it."

Hooper v. Hudson River F. Ins. Co., 17  
N. Y. 426.

122.

Judgment for B. It was A's duty, as well as contract to return the horse to B at the expiration of the month for which it was hired, and when he, without B's consent, kept the horse for a longer time, he became answerable "in all events" for losses happening thereafter.

Vol. 1, Cowen Treatise (5th ed.), sec.  
105.

Onderkirk v. C. N. Bank, 119 N. Y.  
263.

Young v. Leary, 135 N. Y. 576.

5 Cyc. of Law & Pro., pp. 176, 177, 178,  
182, 183, 184.

123.

Judgment for the defendant, warehouseman.

"A failure upon the part of a bailee to deliver to a bailor his property on demand raises a presumption of liability, but

this presumption is *prima facie* only, and may be overcome by evidence. And when it appears that the loss was caused by some accident, the onus continues upon the bailor to prove that such accident was caused by want of care upon the part of the bailee. (Clafin v. Myer, 75 N. Y. 260; Draper v. D. & H. Co., 118 id. 118; Stewart v. Stone, 127 id. 500.)"

Kaiser v. Latimer, 9 App. Div. 38.

Liberty Ins. Co. v. Cent. Vt. R. R. Co.,  
19 id. 509.

#### 124.

A may replevy the horses from C or may demand same, and on refusal may sue in conversion, or he may waive the tort and sue for their value.

Terry v. Munger, 121 N. Y. 161.

Although A and B violated the statute relating to the conditional sale of goods and chattels, C is not within its protection for the reason that he is not a purchaser for value, having taken the horse in extinguishment of an antecedent debt.

Chap. 315, Laws 1884, sec. 1.

Victoria Paper Mills v. N. Y. & Penn.  
Co., 28 Misc. 123.

Levy v. Yazbeck, 22 Misc. 136.

Rochester Distilling Co. v. Devendorf, 72  
Hun, 428.

#### 125.

##### Judgment for A

"The defendant being indebted to the plaintiff for goods sold, gave him the promissory note of a third person, which was received by him in full payment and discharge of the debt. The maker of the note was insolvent at the time of the transfer of the note, though this fact was unknown to the parties. Held, that it was a case of mutual mistake of fact, and that the plaintiff was entitled to recover from the defendants his original debt."

Roberts v. Fisher, 43 N. Y. 159.

126.

The Court should send the case to the jury.

The plaintiff was the sole witness to establish his cause of action.

"The general rule is that where a witness is interested in the question, although he is not impeached or contradicted, his credibility is a question for the jury, and the Court is not warranted in directing a verdict upon his testimony alone."

Saranac & L. P. R. R. Co. v. Arnold,  
167 N. Y. 373.

127.

The Court should overrule the objection and allow the testimony.

"The presentment by a party to his debtor of an account in which he charges a gross sum for services for which he is entitled to be paid *quantum meruit*, there being no payment nor settlement of the account, does not preclude the creditor from showing what the services were reasonably worth, and recovering a larger sum than that at which they were so charged by him."

Williams v. Glenny, 16 N. Y. 389.  
Shiland v. Loeb, 58 App. Div. 565.

128.

'A has no remedy. He cannot prove his parol agreement. Parol evidence of such agreement is inadmissible as it tends to vary the written contract.

Love v. Hamel, 59 App. Div. 360.

129.

On the cross-examination of the opposing witness, call his attention to the time or place of the statement or other identifying circumstances and ask him if he did not at that time or place or under the circumstances stated say the fact to be as it is proposed to prove he said it was.

\* Rice v. Rice, 43 App. Div. 458.

130.

The ruling of the court should be that the question was improper. His opinion should be obtained by stating to him an hypothetical case.

Reynolds v. Reynolds, 64 N. Y. 589.  
Abbott's Trial Brief, Facts, p. 229.

131.

The sentence is void. Grand larceny being a felony the prisoner must, before the verdict is received, appear in person. It cannot be received in his absence.

Code Crim. Proc., sec. 484.

132.

The Court should refuse to discharge the prisoner.

"It is no defense to a prosecution for perjury that the defendant did not know the materiality of the false statement made by him; or that it did not in fact affect the proceeding in or for which it was made. It is sufficient that it was material, and might have affected such proceeding."

Penal Code, sec. 99.

133.

A was not guilty of robbery. The watch was "gone before B was aware of the transaction," so the taking was not by means of force, or violence or fear, and the pistol was employed merely as a means of escape.

Penal Code, secs. 224, 225.

A was guilty of grand larceny in the first degree in that he took the watch from the person of another in the night time.

Penal Code, sec. 530.

134.

Advise B to defend.

He had the legal right to sink a well on his own farm and to take therefrom all the water that he needed for the full and proper enjoyment and usefulness of his land.

This being a subterranean stream with nothing upon the surface to indicate its existence which was unknown, it may be intercepted or diverted by the owner of the land for any purpose of his own, *vide Bloodgood v. Ayers*, 108 N. Y. 400, except, perhaps, for merchandising it, as limited in *Forbell v. City of New York*, 164 N. Y. 522, 525, and *Westphal v. New York*, 177 N. Y. 140.

## 135.

Yes, he has a good defense; the parents of the child are guilty of contributory negligence which is imputable to the child.

"Where a child of such tender age as not to possess sufficient discretion to avoid danger, is permitted by its parents to be in a public highway without any one to guard him, and is there run over by a traveler and injured, neither trespass or case lies against the traveler, if there be no pretense that the injury was voluntary, or arose from culpable negligence on his part."

*Hartfield v. Roper*, 21 Wend. 614.

## 136.

B can maintain his action; C cannot.

To say of a merchant that he is a bankrupt would tend to injure him in his trade, occupation or business. That would not injure a coachman in the same manner, hence the coachman would have to allege and prove special damages.

"Words written or spoken of a man in relation to his business or occupation which will have a tendency to hurt, or are calculated to prejudice him therein, are actionable, although they charge no fraud or dishonesty and were uttered without actual malice; and when proved unless the defendant shows a lawful excuse, the plaintiff is entitled to recover, without allegation or proof of special damage, as both the falsity of the words and resulting damage are presumed."

*Moore v. Francis*, 121 N. Y. 199.

*Vide Crane v. Bennett*, 177 N. Y. 106.

## 137.

John Doe would take the property devised by the brother subject to widow's dower; the sister's property would go to her heirs-at-law and next of kin.

If a testator, having disposed of the whole of his estate by will, afterward marries and has issue of such marriage, and the wife or the issue be living at his death, his will is revoked; the brother dies without having had issue, hence his will stands. A will executed by an unmarried woman is revoked by her subsequent marriage.

Redfield's Surrogate Practice (6th ed.),  
sec. 228, pp. 191, 192.

## 138.

The widow takes all, under the circumstances disclosed. She takes one-half, and the residue because it does not exceed two thousand dollars.

Code Civ. Proc., sec. 2732, subd. 3.

## 139.

The will stands as written and the sons take the residuum; the irate father should have re-executed the same.

"Where a testator attempts to revoke a particular clause by canceling it and giving a legacy thereby bequeathed over to other persons by inserting their names in the will, but without re-execution and attestation of the will, the revocation will not be carried into effect."

Redfield's Surrogate Practice (6th ed.),  
sec. 224, p. 187.

Matter of Carver, 3 Misc. 567.

Matter of Wilcox, 46 St. Rep. 877.

## 140.

The Supreme Court has jurisdiction.

"The Supreme Court may compel specific performance

by a resident of this State of a contract for the conveyance of land lying without its jurisdiction."

Newton v. Bronson, 13 N. Y. 587.

Code Civ. Proc., secs. 982, 984.

Muller v. Dows, 94 U. S. 444.

Dull v. Blackman, 169 U. S. 243.

141.

C as a junior mortgagee has the right to contest the validity of the prior mortgage. This right grows out of his right to redeem, that is to say, his right to have the fund available for the payment of his claim as large as possible.

Vol. XX, Encyc. of Law (2d ed.), p. 1023.

C can bring an action in equity to cancel B's mortgage, and in that action obtain an injunction order restraining B's foreclosure during the pendency of the action.

Code Civ. Proc., secs. 603, 604.

142.

Yes. C was not a purchaser for value.

"A legal title under a recorded deed is good as against a subsequent mortgagee who received his mortgage as security for or in payment of a precedent debt, and who surrendered no security or parted with no value, as he is not a purchaser for a valuable consideration within the meaning of the recording act."

Cary v. White, 52 N. Y. 138.

143.

A wins. He is not liable until B recovers a judgment against the corporation and execution is returned unsatisfied in whole or in part.

Stock Corporation Law (chap. 688, Laws 1892), secs. 54, 55.

## 144.

Judgment in favor of the X Bank against A. Judgment in favor of the B manufacturing corporation against the X Bank.

A manufacturing corporation has no power to indorse notes for the accommodation of another, and the note was void as against the corporation in the hands of the X Bank, which discounted the same with knowledge of the facts.

*Nat. Park Bank v. G. A. M. W. S. & Co.,  
116 N. Y. 281.*

*Fox v. Rural Home Company, 90 Hun,  
365.*

## 145.

No. A stockholder of a corporation is personally liable for all debts due and owing to any of its laborers, servants or employees, other than contractors, for services performed by them for such corporation, but before such laborer, servant or employee shall charge such stockholder for such services, he shall give him notice in writing within thirty days after the termination of such services that he intends to hold him liable and shall commence an action therefor within thirty days after the return of an execution unsatisfied against the corporation upon a judgment recovered against it for services.

*Stock Corp. Law (chap. 564, Laws  
1890), sec. 57.*

*Berwind v. Ewart, 90 Hun, 60.*

## 146.

Up to the time of the divorce the husband had a tenancy by the courtesy initiate in the wife's house and lot, which he lost when she obtained a divorce from him.

*Renwick v. Renwick, 10 Paige, 420.*

The son inherits the property.

*Real Property Law (chap. 547, Laws  
1896), sec. 281.*

## 147.

A has no rights; B was not guilty of any legal irregularities.

B, the wife, had the legal right to marry again, when her husband was finally sentenced to imprisonment for life, and his subsequent pardon did not restore him to the rights of the previous marriage or to the guardianship of the child.

Dom. Rel. Law (chap. 272, Laws 1896),  
secs. 3, 28.

## 148.

Judgment for A, the husband.

Although the wife has been emancipated in many things yet she is still under the common-law disability of being unable to maintain an action against her husband to recover damages for an assault and battery committed by him upon her.

*Abbe v. Abbe*, 22 App. Div. 484.

## 149.

No. The verdict on the first trial was "guilty as charged in the second count," viz., of murder in the second degree, and being silent as to the charge of murder in the first degree it was equivalent to a verdict of not guilty of that crime.

The prisoner's plea of *autrefois acquit* is good, for he cannot be twice put in jeopardy for the same offense.

N. Y. Const., art. 1, sec. 6.

*People v. Dowling*, 84 N. Y. 478.

*People v. Cignarale*, 110 N. Y. 30.

*People v. McCarthy*, 110 N. Y. 314, 315.

## 150.

The Constitution (art. 1, sec. 6) guarantees to all persons accused of crime the right to appear and defend in person and with counsel, and as the Sheriff refused to allow you a private interview with your client in order to prepare for

his trial, he has violated the constitutional rights of the prisoner and a peremptory writ of mandamus will issue to compel him to grant your application.

People ex rel. Burgess v. Riseley, 13  
Abb. N. C. 186.

151.

(1) Summons:

STATE OF NEW YORK.

SUPREME COURT, COUNTY OF ALBANY.

---

JANE DOE, Plaintiff,  
                        }       
                        *against*     }  
JOHN DOE, Defendant.

---

*To the above-named defendant:*

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint. Trial to be held in the county of Albany.

Dated, this .... day  
of January, 190...

X Y Z,  
Plaintiff's Attorney.

Office and Post-office Address,  
....., Albany, N. Y.

Code Civ. Proc., sec. 418.

(2) Legibly write upon the face thereof the following words, "action for a divorce."

Code Civ. Proc., sec. 1774.

(3)

STATE OF NEW YORK, }  
 CITY AND COUNTY OF ALBANY, }  
 ss.:

John Jones, being duly sworn, deposes and says: That he is eighteen years of age, and that on the .... day of January, 190.., at No. 50 Ninth street, in the city of Albany, N. Y., he served the annexed summons personally on John Doe, the defendant herein named, by delivering a copy thereof to him personally, and leaving the same with him, and that he knew the person so served to be the person mentioned and described in said summons as defendant.

That said summons so served on defendant, as aforesaid, had, at the time of such service, legibly written upon the face thereof the following words, "action for a divorce."

That deponent knows said John Doe to be such defendant and the proper person to be served with said summons, because he has known the said defendant for the past ten years, and has been a frequent visitor at his residence, No. 50 Ninth street, in the city of Albany, where said defendant lived with his wife, the plaintiff herein.

Sworn to before me, this .....

day of January, 190..

Code Civ. Proc., sec. 1774.  
 Sup. Ct. Rule 18.

### 152.

If the county designated in the complaint as the place of trial is not the proper county, you must serve upon the plaintiff's attorney, with your answer or before service of the answer, a written demand to change the place of trial to the proper county, designating it.

If the plaintiff's attorney does not serve his written consent to the change as proposed by the defendant within five days after the service of the demand, the defendant's attorney may, within ten days thereafter, serve notice of motion to change the place of trial.

Code Civ. Proc., secs. 982-989, inclusive

## 153.

Sue the young woman in tort for the damages sustained.

She was a bailee, and the moment she transcended the terms of the bailment and used the horse in a manner different than that agreed upon by driving beyond the ten miles, and keeping it for three days, she was guilty of conversion.

Disbrow v. Tenbroeck, 4 E. D. Smith,  
397.

Fish v. Ferris, 5 Duer, 49.

Infants are liable for their torts, the same as adults.

Campbell v. Stakes, 2 Wend. 137.

Moore v. Eastman, 1 Hun, 578.

Conklin v. Thompson, 29 Barb. 218.

She is answerable for all losses happening after the time for which she hired the horse.

Vol. 1, Cowen's Treatise (5th ed.), sec.  
105.

Young v. Leary, 135 N. Y. 576.

Onderkirk v. C. N. Bank, 119 N. Y. 263.

5 Cyc. of Law & Pro., title Bailment,  
pp. 176, 177 *et seq.*

## 154.

A sham answer or a sham defense can be stricken out by the Court upon motion (Code Civ. Proc., sec. 538), but a verified counterclaim cannot be stricken out as sham under that section.

Briggs v. Freedman, 9 Civ. Proc. 73.

Collins v. Suan, 7 Robt. 94.

Fettretch v. McKay, 47 N. Y. 426.

## 155.

An action for damages for an assault, not being an action in which the clerk can enter final judgment, without permission, the plaintiff must apply to the Court or to a judge or justice thereof out of court for judgment.

Code Civ. Proc., sec. 1214.

The damages must be ascertained by a writ of inquiry (Code Civ. Proc., sec. 1215); which are assessed by a sheriff's jury.

Rumsey's Practice, Vol. 2, p. 600.

The report or inquisition may be directed to be returned to the Court or judge for further action; if not so returned, the clerk enters judgment for the damages ascertained by the inquisition without any further application.

Code Civ. Proc., sec. 1215.

156.

Advise the sheriff to empanel a jury to try the validity of the claim to the horses of the person claiming the same.

Code Civ. Proc., sec. 657.

157.

Yes. He was in possession and made permanent improvements on the faith of the donor's promise. Equity will protect the gift under the circumstances.

"A parol gift of real estate and a parol promise to convey the same is valid and enforceable in equity, where the donee has entered into possession of the property and made permanent improvements thereon, on the faith of the donor's promise, and this, although when specific performance by the donee is claimed, the rental value of the property for the time it has been occupied by the latter would be more than the amount expended by him."

Young v. Overbaugh, 145 N. Y. 158.

Hays v. Knauth, 169 N. Y. 304.

158.

C takes the planing machines; they are personal property under the circumstances.

D takes the water wheel and the gearing for propelling the machinery; they are real estate.

Murdock v. Gifford, 18 N. Y. 28.

Ford v. Cobb, 20 N. Y. 344.

Voorhees v. McGinnis, 48 N. Y. 278.

## 159.

No. B's defense is not good.

The fact that A refused to allow B to enjoy his legal right of passage over the right of way deeded to him does not justify B in committing a trespass on A's land.

B should have removed the obstruction and sued for his damages.

*Williams v. Safford*, 7 Barb. 309.

## 160.

Judgment for Richard Roe. - The contract is void for want of mutuality. Doe did not agree to employ Roe for any particular time, hence Roe was not obliged to stay for any definite period, and could leave at his option without incurring liability.

*Burnet v. Bisco*, 4 Johns. 235.

*Tucker v. Woods*, 12 Johns. 190.

*Vol. 7 Am. & Eng. Encyc. of Law* (2d ed.), p. 114; *vol. 20, id.*, p. 14.

## 161.

'A has no defense.

"An action for the breach of promise will lie at once, upon a positive refusal to perform the contract of marriage, although the time specified for the performance has not arrived."

*Burtis v. Thompson*, 42 N. Y. 246.

*Windmuller v. Pope*, 107 N. Y. 674.

*Roehm v. Horst*, 178 U. S. 1.

*Vide 30 L. R. A. 33*, and note.

## 162.

(1) Master and servant.

*Vol. 20 Am. and Eng. Encyc. of Law* (2d ed.), p. 18.

*Wilber v. Sisson*, 53 Barb. 258.

(2) Tenants in common.

*Parker v. Mott*, 43 App. Div. 341.

*Putnam v. Wise*, 1 Hill, 234.

163.

Judgment for C.

"The rule is that as to all persons who have had actual dealings with the firm, actual notice of the dissolution must be given."

Bank v. Weston, 159 N. Y. 211.

164.

Judgment for B.

The note was given in consideration of the right to make, use and sell a patented article and contained the words, "given for a patent right."

Such a note or instrument in the hands of any purchaser or holder is subject to the same defenses as in the hands of the original holder.

Neg. Inst. Law (chap. 612, Laws 1897),  
sec. 330.

Eaton & Gilbert on Com. Paper, p. 690.

165.

Judgment for B. C was not an indorser but a guarantor, and as such was not entitled to notice of dishonor.

"A person placing his signature upon an instrument, otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

Neg. Inst. Law (chap. 612, Laws 1897),  
sec. 113.

Eaton & Gilbert on Com. Paper, p. 412;  
Id., p. 445.

166.

Judgment for C. It was A's duty to disclose his principal.

"A person, even though making an agreement for another, makes himself personally liable thereon if he contracts in his own name without disclosing his principal, although the other party to the contract may suppose that he is acting as agent."

De Remer v. Brown, 165 N. Y. 419.

He must have actual knowledge.

Cobb v. Knapp, 71 N. Y. 348.

167.

Judgment for A.

The agent had no right to sell his own stock to his principal; it was a breach of duty and the contract is subject to rescission, irrespective of any question of intentional fraud or actual injury.

Conkey v. Bond, 36 N. Y. 427.

Taussig v. Hart, 58 N. Y. 425.

168.

A is discharged. At the time A called upon B to sue C, the debtor, the latter was solvent; the notice was explicit and the surety, having become prejudiced by the subsequent insolvency of C, is discharged.

Maier v. Canavan, 8 Daly, 272.

Marsh v. Dunckel, 25 Hun, 167.

Thompson v. Hall, 45 Barb. 214.

Hunt v. Purdy, 82 N. Y. 486.

169.

D can recover from A and B but not from C the surety. His obligation was to the principal named in the bond, and when the bond was paid, he had no further concern or interest in the transaction. The payment was made without his request or promise to repay.

Elmendorph v. Tappen, 5 Johns. 176.

170.

The policy should be paid to A. A policy issued upon the life of a husband, payable to the wife, if living, if not living, to their children is assignable by the wife with the written consent of the husband. The consideration for the assignment, to wit, their "joint debt," was sufficient.

Anderson v. Goldsmidt, 103 N. Y. 620.

Miller v. Campbell, 140 N. Y. 457.

Dom. Rel. Law (L. 1896, ch. 272),  
sec. 22.

## 171.

A is entitled to recover his insurance, \$2,000 on the horses and \$2,000 on the cattle. He is not entitled to recover the insurance on the sheep which were mortgaged.

"Having made the property distinct subjects of insurance by separately valuing it, by distributing the insurer's risk among the several subjects of insurance, and limiting its risk among the several subjects of insurance, and limiting its risk as to each, the parties to the contract will be deemed to have intended as many distinct insurances as there may be subjects of insurance; and the avoidance of the policy by breach of its condition as to one of the subjects of insurance will not have the effect of avoiding it as to the others, in the absence of language clearly indicating that such was the intention of the parties."

Am. Artistic Gold S. Co. v. Glens Falls  
Ins. Co., 1 Misc. 117.

Knowles v. Am. Ins. Co., 66 Hun, 220;  
affd., 142 N. Y. 641; 61 App. Div.  
350.

## 172.

The transaction was a sale, and A had no rights. Flour from the identical wheat was not to be delivered.

Foster v. Pettibone, 7 N. Y. 433.  
*Vide* Mack v. Snell, 140 N. Y. 195 and  
201.

## 173.

The jeweler has no lien. The vase was to be delivered to A on January 2, 1902, and A was to pay him \$500 for his services within sixty days thereafter. This credit prevented the jeweler from obtaining a lien.

"Where a particular time of payment is fixed by the contract which is or may be subsequent to the time when the owner is entitled to a return of the property, there can be no lien."

Wiles L. Co. v. Hahlo, 105 N. Y. 234.  
Morgan v. Congdon, 4 N. Y. 552.

## 174.

B cannot offset his claim for damages.

The contract was one to "thereafter manufacture 5,000 watch cases."

There was no warranty which survived acceptance, nor any fraud or concealment. There were no latent defects; the defects were determined upon inspection and when B, with knowledge of their condition, accepted the same, and neither returned nor offered to return them, he lost his claim for damages, if any.

*Smith v. Coe*, 170 N. Y. 162.

*Bierman v. City Mills Co.*, 151 N. Y.  
482.

*Carleton v. Lombard Ayres Co.*, 149  
N. Y. 137.

## 175.

B can do nothing; he has no claim. The contract is void by the statute of frauds.

It was not in writing and being for the sale and delivery of goods for the price of more than \$50, it was void because the buyer did not receive or accept part or all of such goods at the time, nor at the time pay any part of the purchase money.

*Personal Property Law* (chap. 417, Laws  
1897), sec. 21, subd. 6.

## 176.

Yes; the exception was well taken.

"The declarations of one partner after dissolution of the firm, not made in the business of winding up, and not in relation to any transaction or dealing connected with the dissolution of the partnership, are inadmissible against a copartner."

*Nichols v. White*, 85 N. Y. 531.

*Desbecker v. Cauffman*, 169 N. Y.  
553.

*Encyc. of Evid.*, vol. 1, p. 580.

177.

The objection was that the account-books were not competent nor proper as being the declarations of the party in his own favor. The Court properly ruled them out. If the tradesman had then proven that the books were his books of account, kept by him in his business as a retail grocer, and contained items of account kept in the ordinary course of book accounts, that there were regular dealings between the plaintiff and defendant, that some of the articles mentioned had been delivered and that he kept honest and fair books of account by some person who had dealings with him and settled his accounts thereon, and that he kept no clerk, the books would have been received as admissible evidence for the consideration of the Court or jury.

Vosburgh v. Thayer, 12 Johns. 461.  
Smith v. Rentz, 131 N. Y. 169, 171.

178.

The deed proves itself, as an ancient document after thirty years. The deed, however, must be free from just grounds of suspicion and must come from the proper custody or have been acted upon, so as to afford some corroborative proof of its genuineness.

1 Greenleaf on Evidence, sec. 570.  
Donohue v. Whitney, 133 N. Y. 186.  
Stephens' Digest Law Evidence (Beers' ed., N. Y.), 315.

179.

The ruling was wrong.

In a case where the question of fraud or deceit in a written contract is in issue, oral evidence of the acts and declarations of the parties prior to the execution of the contract touching the fraud or deceit are admissible.

Vol. 14 Encyc. of Law (2d ed.), 494.  
Howison v. Alabama Coal & Iron Co.,  
70 Fed. Rep. 683.  
Koop v. Handy, 41 Barb. 454.

180.

The ground of the objection was that A was endeavoring to impeach his own witness. The objection was sustained.

"A party may contradict his own witness as to a fact material in the case, although the effect of the proof may be to discredit him; but he cannot impeach him, although subsequently called as a witness for the adverse party, either by general evidence or by proof of contradictory statements out of Court."

Coulter v. Am. Merchts. Un. Exp. Co.,  
56 N. Y. 585.

181.

Forgery in the first degree.

Penal Code, sec. 510.

182.

No. The confession was not voluntary having been made after arrest upon the express promise of the officer that if he would confess he would use his influence in his behalf, provided he made disclosures which would be of benefit to the government.

Cox v. People, 80 N. Y. 502.  
People v. Chapleau, 121 N. Y. 266.  
1 Greenleaf on Evidence, sec. 219.

183.

The conviction will stand.

A and B confederated to rob C. A, in furtherance of the conspiracy, violently assaulted C so as to enable his confederate B to steal the watch, which he was enabled to do by reason of the force and violence used upon C. Both were principals and guilty of robbery. B was properly convicted.

Penal Code, secs. 224, 29.

184.

The company is not liable. A was injured by the lightning which was the proximate cause of his injury, and not

by the defect in the locomotive, which was the remote cause. The defect in the locomotive neither invited nor caused the lightning nor did it come because of the delay.

*Vide Laidlaw v. Sage*, 158 N. Y. 98  
*et seq.*

185.

No; the judgment will not be affirmed.

The release of one of two or more joint tort feasors is a discharge of all.

*Barrett v. Third Ave. R. R. Co.*, 45 N. Y. 628.

*Mitchell v. Allen*, 25 Hun, 543.

*Kolk v. National Surety Co.*, 176 N. Y. 233.

186.

(1) The first proposition is correctly charged. An insane person is liable for his torts the same as a sane person.

(2) The second proposition is incorrectly charged.

An insane person is liable only for compensatory damages, and not for punitive damages for assault and battery, because he is incapable of intention which is malice.

*Williams v. Hays*, 143 N. Y. 442.

*Krom v. Schoonmaker*, 3 Barb. 647.

187.

The daughter, D, takes the house and lot specifically devised to her; B, the son, all the remainder of the property including the stock of the X Bank found in the envelope; the daughter, C, takes nothing. There arose what is known in the law as "an ademption."

"If a testatrix devises real estate and sells the same before the will takes effect, the proceeds of the sale will become personal estate, and no court can substitute the money received by the testatrix for the land devised."

*Ametrano v. Downs*, 170 N. Y. 391.

*Adams v. Winne*, 7 Paige Ch. 97.

*Beck v. McGillis*, 9 Barb. 35.

The direction on the envelope that it was "his will and intention that the stock should go to C, in place of the real estate for which it stood and represented and of which it was the avails," was ineffectual as a gift for it was not known nor was it delivered prior to the father's death.

No claim is made that the memorandum was either a will or a codicil thereto or a substitutionary clause therein; if either, it would be invalid for the want of proper execution.

Redfield's Surrog. Prac. (6th ed.),  
sec. 751, pp. 628, 629.

### 188.

Where an unmarried man disposes of his whole estate by will and thereafter marries and has issue of the marriage, which or his wife are alive at the time of his death, the subsequent marriage revokes his will.

Redfield's Surrog. Prac. (6th ed.),  
sec. 228, pp. 191-192.

A therefore died intestate and his real estate descended to his two children share and share alike subject to the widow's dower.

Real Property Law (chap. 547, Laws  
1896), secs. 281, 170.

### 189.

B cannot recover his legacy; C being a minor can.

Such a clause in a will is valid and will be upheld (*Matter of Stewart's Will*, 5 N. Y. Supp. 32; 29 Encyc. of Law [1st ed.], p. 483), except as against infants who contest a will not personally but by guardian.

Woodward v. James, 44 Hun, 96.  
Bryant v. Thompson, 59 Hun, 545.  
Id., 128 N. Y. 426, 432.

### 190.

**A** wins.

"He who comes into equity must come with clean hands."

An offensive and detrimental stable, erected and maintained on a lot next adjoining A's family residence, would be a nuisance and when B procured from A written contract

of sale in reliance on his false representation that he wished to buy it so as to erect thereon a residence for himself and family, when as matter of fact he bought it with intent that an offensive and detrimental stable should be erected thereon, he was guilty of a fraud, directly connected with the matter in litigation, and will not be decreed specific performance.

*Vide* 11 Am. & Eng. Encyc. of Law (2d ed.), p. 164.

191.

B being a party to the action is entitled to have the property sold in the inverse order of alienation.

He can have the judgment in the action provide that the third parcel, the property of the owner, be sold first; if that be insufficient, then that the property sold to C be next disposed of; if there then remains any sum due and unpaid on the judgment, that his parcel be finally sold.

N. Y. Life Ins. & Trust Co. v. Milnor,  
1 Barb. Ch. 353.  
Woods v. Spalding, 45 Barb. 602.

192.

The steel owned by B was sacrificed to save the cargo and the vessel at a time when both were in imminent danger of being lost or destroyed by reason of the perils of the sea, and he is entitled, under the law of general average, to contribution from all that was saved out of the ship, freight and cargo, to make good his general average loss.

Nelson v. Belmont, 21 N. Y. 36.  
Harris v. Moody, 30 N. Y. 268.

The maxim involved is "Equality is equity."

Vol. XI Am. & Eng. Encyc. of Law (2d ed.), p. 187.  
Vol. 7, id., pp. 328, 329.

193.

The note is invalid. It required corporate action, to wit, a resolution of the board of directors, to authorize the treasurer to execute the note for a special purpose. Corporate

action to bind the corporation can only be had by appropriate action of its governing board; that is, by the collective authority of the board of directors acting as a board. Such action was not had here, and, therefore, the treasurer had no power to make the note in question.

People's Bank v. St. Anthony's R. C. Church, 109 N. Y. 512.

#### 194.

The corporation being unable to pay its obligations as they become due in the regular course of business was insolvent, and all officers and directors were forbidden to transfer any of its property to any of its officers, directly or indirectly, for the payment of any debt or upon any other consideration than the full value of the property paid in cash.

The transfer of the property to A, its president, under the circumstances was invalid. A is bound to account therefor to the creditors, stockholders or other trustees of the X corporation; in addition, he is personally liable to the creditors and stockholders of the corporation to the full extent of any loss they may respectively sustain by the transaction.

Stock Corp. Law (chap. 564, Laws 1890), sec. 48.

#### 195.

It is unlawful for a foreign stock corporation, other than a moneyed corporation, to do business in this State without having first procured from the Secretary of State a certificate that it has complied with all the requirements of law, as set forth in sections 15 and 16 of the General Corporation Law (chap. 567, Laws 1890, as amended).

It must also pay a license fee.

Sec. 181 Tax Law (chap. 908, Laws 1896).

#### 196.

He can, as corespondent named in the complaint, at any time before the entry of judgment, appear either in person or by attorney, demand of plaintiff's attorney a copy of the

summons and complaint, and defend such action so far as the issues affect him.

Sec. 1757, Code Civ. Proc.

197.

Yes, he can. Not having the money, it is not necessary for him to restore. If he had possession of any of the purchase price when he disaffirms or after he became of age, the rule would be different.

"The right (of the infant) to repudiate is based upon the incapacity of the infant to contract, and that incapacity applies as well to the avails as to the property itself, and when the avails of the property are improvidently spent or lost by speculation or otherwise during minority, the infant should not be held responsible for inability to restore them. To do so would operate as a serious restriction upon the right of an infant to avoid his contract, and in many cases would destroy the right altogether."

Green v. Green, 69 N. Y. 553.

Rice v. Butler, 25 App. Div. 388, 392.

MacGreal v. Taylor, 167 U. S. 688 and note, Book 42, Co-op. Ed. U. S. Repts., p. 326.

198.

It is the husband's obligation to furnish suitable support for his wife.

He is not obliged to support her, however, when she willfully deserts and refuses to live with him. The tradesman knew of this and if he supplied her with necessaries during that period he cannot hold the husband therefor. When on January 1, 1900, she offered to return to her husband, his liability to furnish her with necessaries was thereby revived, and he is liable for those furnished thereafter.

McGahay v. Williams, 12 Johns. 293.

McCutchen v. McGahay, 11 Johns. 281.

Bloomingdale v. Brinckerhoff, 2 Misc.

49.

Daubney v. Hughes, 60 N. Y. 187.

## 199.

The property of the X Electric Railway being necessary to the proper use and enjoyment of its franchises, it cannot be condemned by right of eminent domain by another railroad corporation for its corporate purposes without an express act of the Legislature permitting it to do so.

Matter Boston & Albany R. R. Co., 53  
N. Y. 575.

S. R. T. Co. v. Mayor, 128 N. Y. 10.  
People ex rel. v. Thompson, 98 N. Y.  
6 at 11.

Matter of Pet. of N. Y., L. & W. R. R.  
Co., 99 N. Y. 12.

Matter of City of Buffalo, 68 N. Y. 167.  
Matter of N. Y. C. & H. R. R. Co., 77  
N. Y. 249.

## 200.

The sentence is invalid.

"A statute which purports to authorize the prosecution, trial and punishment of a person for an offense previously committed, and as to which all prosecution, trial, and punishment were at the time of the passage of such statute already barred, according to pre-existing statutes, is *ex post facto*."

12 Am. & Eng. Encyc. of Law (2d ed.)  
532.

In this State that rule has been applied to offenses committed prior to the passage of the act extending the time within which indictments may be found.

People v. Lord, 12 Hun, 282.  
Citing Wharton's Crim. Law, Vol. 1, sec.  
444a.

Vide Carpenter v. Shimer, 24 Hun, 465.  
People v. O'Neil, 109 N. Y. 251.

201.

SUPREME COURT, ALBANY COUNTY.

JANE DOE, an Infant, by A. B., her Guardian, Plaintiff,

against

JOHN STILES, Defendant.

The plaintiff complaining of the defendant alleges:

I. That the plaintiff is an infant under the age of twenty-one years.

II. That on the ..... day of ....., 190.. at Albany, N. Y., upon application duly made on her behalf, the above-named A B was, by an order of this Court, duly appointed the guardian of the plaintiff for the purposes of this action.

III. That heretofore the defendant made his promissory note in writing, dated on the second day of January, 1903, at Albany, N. Y., and thereby promised to pay to the plaintiff or to her order, five hundred dollars (\$500.00), three months after said date.

IV. That no part of said note has been paid.

Wherefore, plaintiff demands judgment against said defendant for five hundred dollars with interest thereon from April 3, 1903, besides the costs of this action.

X Y Z,

Plaintiff's Attorney,

Office and Post-office Address: ...., Albany, N. Y.

The complaint of an infant by his guardian must set forth the appointment of the guardian with certainty as to time, place, and power of appointment.

Grantmann v. Thrall, 44 Barb. 173.

Stanley v. Chappell, 8 Cow. 235.

Hulbert v. Young, 13 How. Pr. 413.

Code Civ. Proc., secs. 468, 469, 470, 472.

202.

Keep it. An answer to a verified complaint in an action for libel need not be verified. The defendant need not verify

in a case where he would be privileged from testifying as a witness concerning an allegation or denial contained in the pleading.

Code Civ. Proc., sec. 523.

Blaisdell v. Raymond, 6 Abb. Prac.  
Repts. 148.

### 203.

#### Motion denied.

"The answer did not put in issue the allegations of the complaint that defendant made the excavation which caused the injury, and that the same was in a public street; and, therefore, plaintiff was not required to prove the same on the trial."

Clark v. Dillon, 97 N. Y. 370.

### 204.

A reply is necessary, where the answer contains a counter-claim and the plaintiff does not demur, and in a case where an answer contains new matter constituting a defense by way of avoidance, the Court directs the plaintiff to reply to the new matter.

If a reply is necessary and the plaintiff fails to reply, apply, upon notice, for judgment thereon.

Code Civ. Proc., secs. 514, 515, 516.

### 205.

"Where the injunction order was granted without notice, the party enjoined may apply, upon the papers upon which it was granted, for an order vacating or modifying the injunction order. Such an application may be made, without notice, to the judge or justice who granted the order, or who held the term of Court where it was granted; or to a term of the Appellate Division of the Supreme Court. It cannot be made without notice, to any other judge, justice or term, unless the applicant produces proof, by affidavit, that, by reason of the absence or other disability of the judge or justice who granted the order, the application cannot be made to him; and that the applicant will be exposed

to great injury, by the delay required for an application upon notice. The affidavit must be filed with the clerk; and a copy thereof, and of the order vacating or modifying the injunction order, must be served upon the plaintiff's attorney before that order takes effect."

Code Civ. Proc., sec. 626.

### 206.

Obtain a writ of prohibition.

"The office of a writ of prohibition is to prevent the exercise by a tribunal possessing judicial powers of jurisdiction over matters not within its cognizance, or to prevent it from exceeding its jurisdiction in matters within its cognizance."

Thomson v. Tracy, 60 N. Y. 31.

Code Civ. Proc., secs. 2091, 2102.

### 207.

COMMONWEALTH OF MASSACHUSETTS, } ss:  
COUNTY OF SUFFOLK,

On this ..... day of ....., 1903, before me personally appeared A B, to me personally known, and known to me to be the individual described in and who executed the foregoing instrument and acknowledged that he executed the same for the uses and purposes therein mentioned.

X Y,  
Justice of the Peace, or Notary Public.

Attach county clerk's certificate as to Massachusetts officer's authority.

*Vide* Real Property Law (chap. 547, Laws 1896), secs. 249 *et seq.*

### 208.

A's mortgage is ahead of C's judgment. An unrecorded mortgage has priority over a subsequent docketed judgment, unless there be some facts making a superior equity.

Weaver v. Edwards, 39 Hun, 235.

## 209.

From C and D. The farm having been devised to the "son and daughter and their heirs to be held in joint tenancy," it is subject to the doctrine of survivorship, and when the son died intestate, his estate in the farm passed at once to the daughter, his cotenant, to the exclusion of his son. When the daughter died intestate the title to the farm became vested in her two sons B and C, and when B died intestate, his share went to his daughter D, who with C owned the entire farm at the time your client desired to purchase it.

Kent's Com., Vol. 4, pp. \*358, \*359,  
\*360.

Real Property Law (chap. 547, Laws  
1896), secs. 56, 281.

Willard on Real Estate, pp. 177, 183.

## 210.

A cannot recover from B the \$1,000 paid for the reason that he himself repudiates the contract.

A contract, made as well for the sale of real as of personal property, which is entire, founded upon one and the same consideration, and is not reduced to writing is void, as well in respect to the personal as to the real property, the subject of the contract.

De Beerski v. Paige, 36 N. Y. 537.

Thayer v. Rock, 13 Wend. 53.

Harsha v. Reid, 45 N. Y. 420.

"If one pays money, or renders service or delivers property upon an agreement condemned by the statute of frauds he may recover the money paid in an action for money had and received, and he may recover the value of his services and of his property upon an implied assumpit to pay, provided he can show that he has been ready and willing to perform the agreement, and the other party has repudiated or refused to perform it."

Day v. N. Y. C. R. R. Co., 51 N. Y. 590.

Reed v. McConnell, 133 N. Y. 435.

## 211.

Yes. Not knowing that A was married at the time of the promise. She can sue at once; no demand or refusal is necessary, it being impossible for A to perform.

*Cammerer v. Muller*, 60 Hun, 578.

*Kerns v. Hagenbuchle*, 17 N. Y. Supp. 367.

*Blattmacher v. Saal*, 29 Barb. 22.

*Johnson v. Caulkins*, 1 Johns. Cases, 116.

*Willard v. Stone*, 7 Cow. 22.

*Windmuller v. Pope*, 107 N. Y. 674.

*Burtis v. Thompson*, 42 N. Y. 246.

## 212.

Apply the money on the second or partnership execution. Partnership property is not liable for individual debts until the partnership debts are paid.

*Eighth Nat. Bank v. Fitch*, 49 N. Y. 539.

*Muir v. Leitch*, 7 Barb. 341.

*Kelly v. Scott*, 49 N. Y. 595.

*Menagh v. Whitwell*, 52 N. Y. 146.

## 213.

No. A is not estopped; the sale having been made without notice or knowledge of A's acts or declarations, it was not made in reliance upon the same, nor in belief that A was a partner. A did not enter into the transaction at the time of its consummation.

*Griffin v. Carr*, 21 App. Div. 51.

*Malloney v. Horan*, 49 N. Y. 111.

## 214.

A is not liable on the note, having transferred the same without indorsement, but he is guilty of a misdemeanor for having transferred a promissory note, not having the words, "given for a patent right," written or printed legibly and prominently on the face of such note above the signature

thereto, knowing the consideration of such note to consist in whole or in part of the right to make, use and sell a certain invention claimed by him to be patented.

Sec. 330, Nego. Inst. Law (chap. 612,  
Laws 1897).

Sec. 2, chap. 65, Laws 1877.

215.

Judgment for the X Bank. D, one of his partners, was notified of the nonpayment and dishonor of the note.

"Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution."

Nego. Inst. Law (chap. 612, Laws 1897),  
sec. 170.

Eaton & Gilbert on Com. Paper, p. 491.  
*Hubbard v. Matthews*, 54 N. Y. 43, 50.

216.

Judgment for C. C was not called upon to inquire, it was A's duty to disclose his principal.

"A person, even though making an agreement for another, makes himself personally liable thereon if he contracts in his own name without disclosing his principal, although the other party to the contract may suppose that he is acting as agent."

*De Remer v. Brown*, 165 N. Y. 419.

C was entitled to actual knowledge of the name of A's principal.

*Cobb v. Knapp*, 71 N. Y. 348.

217.

B can recover his commission from both A and C.

He brought them together and they then personally negotiated with each other and concluded the sale. B did all that he was employed to do, viz., to find a purchaser for each, for his house upon terms and conditions to be agreed

upon after they met. There was nothing inconsistent nor improper in his conduct, and there was "no violation of duty in such case in agreeing for commissions from each party upon a bargain being struck, or in failing to notify each party of his employment by the other."

Knauss v. K. B. Co., 142 N. Y. 75.  
Gracie v. King, 56 App. Div. 203.

### 218.

C is entitled to the benefit of all collaterals received by the creditor, although he did not originally rely upon them, or know of their existence, and is entitled in equity to the benefit thereof as against B who surrendered the same to A without his knowledge or consent.

Vail v. Foster, 4 Comst. 312.  
Higgins v. Wright, 43 Barb. 461.  
Merchants & Mfrs. Bank v. Cumings,  
149 N. Y. 364.  
Cowen's Treatise, Vol. 1 (5th ed.), sec.  
457.

### 219.

A can only recover \$5,000, the amount he paid. He is entitled to indemnity only, and cannot recover the amount extinguished by his payment.

Bonney v. Seely, 2 Wend. 482.

### 220.

The policy was valid, nor was it a wager policy.

"Where a person takes out a policy of insurance upon his own life, and the amount is made payable to another having no interest in the life \* \* \* the beneficiary may hold and enforce the policy, if it was valid in its inception and was procured in good faith."

Olmstead v. Keyes, 85 N. Y. 593.  
Steinback v. Diepenbrock, 158 N. Y. 24.  
Classey v. Met. Life Ins. Co., 84 Illin.,  
350.

## 221.

The company is liable. A deed absolute in form, but in fact given as security for a debt, is a mortgage by operation of law (*Mooney v. Byrne*, 163 N. Y. 91), and is not such a change in the title or possession of the subject of insurance as would avoid the policy.

Barry v. Hamburg Bremen Fire Ins. Co.,  
110 N. Y. 1.

## 222.

The transaction was a bailment, and A can recover his property from the sheriff.

A was to receive from the miller 2,000 barrels of flour ground out of the identical wheat delivered to him for that purpose.

Where a contract is made with a manufacturer to deliver to him raw materials to be returned manufactured, the contract is one of bailment and not of sale, and the title to the article remains when manufactured in the original owner.

Foster v. Pettibone, 7 N. Y. 433.  
Mack v. Snell, 140 N. Y. 193.

## 223.

Yes. By proving that the fire occurred through the negligence of the warehouseman; he is liable under those circumstances notwithstanding his receipt which exempted him from liability for loss or damage to the stored goods by fire.

Germania Fire Ins. Co. v. M. C. R. R.  
Co., 72 N. Y. 90.  
Clafin v. Meyer, 75 N. Y. 260.  
Stewart v. Stove, 127 N. Y. 506.  
Canfield v. B. & O. R. R. Co., 93 N. Y.  
536, 537.

## 224.

B can offset his claim for damages. There was an agreement that the watch cases which were *in esse* would be like the sample exhibited and that amounts in law to a "war-

ranty" which survives acceptance, with knowledge of the breach thereof.

Brigg v. Hilton, 99 N. Y. 517.  
Fairbank Canning Co. v. Metzger, 118  
N. Y. 260.  
Zabriskie v. C. V. R. R. Co., 131 N. Y.  
72.  
Kent v. Friedman, 101 N. Y. 616.  
Mack v. Snell, 140 N. Y. 203.

225.

A is entitled to bring an action immediately for the breach without tendering delivery.

Windmuller v. Pope, 107 N. Y. 674.

"When the vendee of personal property, under an executory contract of sale, refuses to complete his purchase, the vendor may keep the article for him and sue for the entire purchase price; or he may keep the property as his own and sue for the difference between the market value and the contract price; or he may sell the property for the highest sum he can get, and after crediting the net amount received, sue for the balance of the purchase money."

Ackerman v. Rubens, 167 N. Y. 408.  
Van Brocklen v. Smeallie, 140 N. Y. 70.

226.

Judgment should be reversed as to B. In tort the admissions of one joint tort feasor are not admissible against the other, unless conspiracy has been established.

Wilson v. O'Day, 5 Daly, 354.  
De Benedetti v. Manchin, 1 Hilt. 213.  
Carpenter v. Shelden, 5 Sandf. (Sup. Ct.) 77.  
1 Encyc. Evid. 589.

227.

The Court should direct the jury to acquit. A child of the age of seven years and under the age of twelve years is

presumed to be incapable of crime, but the presumption may be removed by proof that he had sufficient capacity to understand the act or neglect charged against him, and to know its wrongfulness. The district attorney failed to make proof of capacity.

**Penal Code, sec. 19.**

**Stone v. Dry Dock, etc., R. R. Co., 115 N. Y. 109.**

### 228.

**The objection was sustained.**

It does not appear that the wife's statement was made at the time of the assault, and if it was made thereafter, it would not be a part of the *res gestæ*. Her dying declaration is not admissible. Such declarations are admissible only in homicide cases under certain restrictions.

**Spatz v. Lyons, 55 Barb. 476.**

### 229.

**Objection overruled.**

"Where a party calling a witness is surprised by testimony contrary to his expectations, he may be permitted to interrogate the witness in respect to previous declarations made by the latter inconsistent with his testimony, for the purpose of probing his recollection, and by showing the witness that he is mistaken, inducing him to correct his evidence, or by recalling to his mind the statements previously made, drawing out an explanation of his apparent inconsistency, and also for the purpose of showing the circumstances which induced the party to call him, and such inquiries will not be excluded simply because they may result unfavorably to the witness. But where the sole effect of an affirmative answer to a question asked by a party to his own witness will be to discredit the witness, it is properly excluded."

**Bullard v. Pearsall, 53 N. Y. 230.**

**See also 1 Greenleaf Ev., sec. 444.**

**Putnam v. U. S. 162, U. S. 687.**

## 230.

No. The proof was competent, not to show special damages, as none had been alleged, but as bearing upon the hurtful tendency of the libel and the general damage.

Morey v. M. J. Assoc., 123 N. Y. 207.

Gates v. N. Y. Recorder Co., 155 N. Y. 232.

## 231.

By attachment.

Andrews v. Andrews, 2 Johns. Cases, 109.

Jackson v. Mann, 2 Caines, 92.

People v. Vermilyea, 7 Cow. 108.

Matter of O'Toole, 1 Tuck. Surr. 39.

He may also be punished as for a criminal contempt, or indicted for misdemeanor.

Code Crim. Proc., secs. 611, 617, 618, 619.

Code Civ. Proc., secs. 8-13.

Penal Code, sec. 143, subd. 4.

## 232.

Robbery in the first degree. Although the purse was obtained by stealth and not by force, B was at the time armed with a dangerous weapon and used the same to retain possession of the stolen property.

Penal Code, secs. 225, 228.

## 233.

Yes. The burden of proof was upon the prosecution to establish the guilt of the prisoner beyond a reasonable doubt, and the charge of the Court as made was erroneous.

In case of a reasonable doubt whether his guilt is satisfactorily shown, the prisoner is entitled to an acquittal.

Code Crim. Proc., sec. 389.

People v. Riordan, 117 N. Y. 73.

People v. Schryver, 42 N. Y. 1.

People v. Guidici, 100 N. Y. 509.

Poole v. People, 80 N. Y. 646.

Miles v. U. S., 103 U. S. 304.

## 234.

The company was not liable. The act of the conductor in detaining the passenger was willful misconduct, but in so doing, he was not acting in the course of his employment.

Mulligan v. N. Y. & R. B. R. Co., 129 N. Y. 506.

Palmeri v. M. R. Co., 133 N. Y. 261.

McLeod v. N. Y. C. & S. L. R. R. Co., 72 App. Div. 119.

Nowack v. M. St. R. Co., 166 N. Y. 440.

Hart v. M. St. R. Co., 65 App. Div. 495.

Collins v. Butler, 83 App. Div. 18.

## 235.

A could not have prevented judgment. The owner of personal property which has been stolen by another may waive the tort and sue the latter for and recover its value upon an implied contract of sale. Where, however, the owner thus elects to treat the transaction as a sale, the title to the property passes to the wrongdoer. Thus when A presented the horse to C, it was his property, and he had a lawful right so to do, and it was immaterial that C knew the facts concerning A's title. C has a defense to the action in replevin and can retain the horse as against the original owner.

Terry v. Munger, 121 N. Y. 161.

Russell v. McCall, 141 N. Y. 449.

Disbrow v. Westchester H. Co., 164 N. Y. 424.

Starr Cash Car Co. v. Reinhart, 2 Misc. 116.

McNutt v. Hilkins, 80 Hun, 235.

## 236.

Judgment for B. A claim or demand to recover damages for a personal injury is not assignable.

Code Civ. Proc., sec. 1910.

## 237.

The will is invalid under the provisions of section 6, chapter 319, Laws 1848, because it was executed within two months of testator's death.

Stephenson v. Short, 92 N. Y. 433.

Hollis v. Drew, 95 N. Y. 166.

Matter of Lampson, 161 N. Y. 511.

## 238.

The will of the father, under the circumstances, was not revoked by the birth of the child born after its execution. The after-born child being unprovided for by any settlement, nor in any way mentioned in the will, is entitled to succeed to the same portion of his father's estate as would have descended or been distributed to him if such parent had died intestate, and he is entitled to maintain an action against the legatees or devisees, as the case requires, to recover his share of the property.

Redfield on Surrog. Prac. (6th ed.),  
sec. 229, p. 192.

Chap. 22, Laws 1869.

Code Civ. Proc., secs. 1868, 2727.

## 239.

A was a married infant of the age of twenty years when she made her will of both real and personal estate. She was competent to make a will of personal property at the time, but not of real property, so that her will was valid as to personal estate, and invalid as to the realty, as to which she died intestate.

B takes the \$10,000 in personal estate under the will. C takes nothing. A, having died intestate as to the real estate, leaving a father, and the inheritance not having come to the intestate on the part of the mother, it goes to her

father, subject to a tenancy by the courtesy in the intestate's husband, issue of the marriage having been born alive.

Real Property Law (chap. 547, Laws 1896), secs. 281, 284.

2 R. S. 56, sec. 1, as amended by Laws 1867, chap. 782, sec. 3.

*Idem*, p. 60, as amended, Laws 1867, chap. 782, sec. 4.

Redfield's Surrogate Prac. (6th ed.), sec. 208, p. 164.

Hatfield v. Sneden, 54 N. Y. 280.

Kent's Com., vol. 4, p. \*506.

#### 240.

The equitable title was in B at the time of the fire and the loss falls on him.

Equity regards that as done which ought to have been done.

Vol. XI Encyc. of Law (2d ed.), pp. 181, 182.

Goldman v. Rosenberg, 116 N. Y. 85.

#### 241.

A's claim is good. X took his assignment of the mortgage, subsequent to the prior equity of A arising out of the agreement between A and B. There was no estoppel; the agreement as to priority was valid and X stood in the place of his assignor.

Collier v. Miller, 137 N. Y. 332.

#### 242.

Put the claim in judgment, issue execution thereon, have it returned unsatisfied, and then begin a creditor's action to set aside the deed as fraudulent and void as against your client.

*Vide* cases generally, Vol. 4 Abb. Cyc. Dig., p. 689, title "Creditor's Suit."

## 243.

Valid. "If the directors shall not be elected on the day designated in the by-laws, or by law, the corporation shall not for that reason be dissolved; but every director shall continue to hold his office and discharge his duties until his successor has been elected."

Gen. Corp. Law, sec. 23, chap. 563, Laws 1890, as amended by chap. 687, Laws 1892.

Geneva Min. Springs Co. v. Coursey, 45 App. Div. 268.

Beardsley v. Johnson, 121 N. Y. 224.

Phila., etc., v. Hotchkiss, 82 N. Y. 474.

## 244.

No. The X corporation was not in existence after the merger; he should have sued the consolidated or Z corporation.

Copp v. Colorado Coal & Min. Co., 29 Misc. 109.

## 245.

As a judgment creditor, A had the right to inspect and take extracts from the "stock-book" of the corporation, which contained the names, alphabetically arranged, of all persons who are stockholders of the corporation, showing their places of residence, the number of shares of stock held by them respectively, the time when they respectively became the owners thereof and the amount paid thereon.

He can compel the corporation to produce such book by mandamus.

People ex rel. Clason v. Nassau Ferry Co., 86 Hun, 129.

Stock Corp. Law, sec. 29, Laws 1890, chap. 564, as amended Laws 1901, chap. 354.

## 246.

~~A~~ should not commence his action for divorce without additional testimony.

"In actions for divorce on the ground of adultery, the confessions of the defendant are always admissible in evidence, but to avoid the danger of collusion, the Court before granting the decree will require such corroboration of the confession as to remove all just suspicion of collusion. When that is satisfactorily done the confessions become a sufficient basis for a judgment for divorce."

Madge v. Madge, 42 Hun, 524.

Sigel v. Sigel, 20 N. Y. Supp. 377.

## 247.

The infant is entitled to sue for and recover the reasonable value of his services.

The express contracts of an infant are voidable at his election, but the adult who makes the agreement with him is bound thereby unless the infant or his guardian regard it as a nullity. If an infant agrees to work for a specified time, and for a specified amount, he may leave before the expiration of the time without cause, and recover for the value of his services for the time he labored, without any deduction for damages for his breaking his contract, and that recovery may be for an amount beyond the contract price, if the evidence shows that his services were worth more.

Cowen's Treat., vol. 2, secs. 1013, 1014,  
1018.

Whitmarsh v. Hall, 3 Denio, 375.

Gates v. Davenport, 29 Barb. 160.

## 248.

To the husband. It will be observed that the services were rendered in and about the husband's house, and while the wife was engaged in her household duties. She was engaged in no other occupation, rendered them with the knowledge and consent of her husband, and made no personal claim for compensation therefor.

The husband, under the circumstances disclosed, is entitled to his common-law right and can avail himself of a profit or benefit from the services of his wife.

*Porter v. Dunn*, 131 N. Y. 314.

249.

The office of overseer of the poor of the village of X, not being a constitutional office, can be abolished by the legislature during the incumbency of an occupant (*People ex rel. v. Whitlock*, 92 N. Y. 191; *Koch v. Mayor*, 152 N. Y. 72; *People ex rel. v. Peck*, 73 App. Div. 89), but the act in question in that regard is void in that it is contrary to the provisions of section 16, article III of the Constitution which reads that "No private or local bill, which may be passed by the legislature, shall embrace more than one subject and that shall be expressed in the title."

*People ex rel. Corseadden v. Howe*, 177 N. Y.

250.

The act is valid.

It is competent for the legislature by a validating act to cure irregularities in assessment proceedings so as to validate retrospectively any proceedings which it might have authorized in advance.

It was within the legislative power to have declared in the act authorizing the local improvement that one insertion in one newspaper was a sufficient advertisement for bids to do the work in question, and having that power in the first instance it can declare an assessment valid that was based on such a publication, although the original act called for more.

*Vol. VI Encyc. of Law* (2d ed.), p. 940.  
*Hatzung v. Syracuse*, 92 Hun, 203.

*Tift v. Buffalo*, 82 N. Y. 204.

*People ex rel. Kilmer v. McDonald*, 69 N. Y. 362.

*W. I. B. Co. v. Town of Attica*, 119 N. Y. 204.

## 251.

..... COURT, ..... COUNTY.

TITLE.

The defendant, for answer to the complaint of the plaintiff in the above-entitled action, alleges, that before this action, and on the .... day of ...., 190.., this defendant paid to the plaintiff ..... dollars in full payment of the account for goods sold and delivered, mentioned and described in the complaint herein.

A B,

Attorney for Defendant.

Office and Post-office Address,

....., N. Y.

Payment is an affirmative defense and must be specifically pleaded in the answer; it cannot be proven under a general denial in the case stated.

McKyring v. Bull, 16 N. Y. 297.

Gabay v. Doane, 77 App. Div. 416.

Lent v. N. Y. & M. R. Co., 130 N. Y.  
504, 511.

## 252.

**Mandamus.** Apply for a peremptory writ of mandamus directed to the public board to compel action on its part. The proceeding is provided for and regulated by secs. 2067 *et seq.* of the Code of Civil Procedure.

People ex rel. Harris v. Commissioners,  
149 N. Y. 26.

People ex rel. Grannis v. Roberts, 163  
N. Y. 70.

People ex rel. Linton v. Brooklyn H. R.  
Co., 69 App. Div. 549.

## 253.

Bring an action in the usual form for rent against the president or treasurer of the club. It is an unincorporated

association of seven or more members having a full set of officers. The procedure is provided for in the Code of Civil Procedure, secs. 1919 *et seq.*

### 254.

A takes all. His execution was delivered first to the sheriff. Personal property, subject to levy, is bound by the execution from the time of the delivery thereof to the proper officer to be executed, and the one first delivered has preference in payment, notwithstanding that a levy is first made by virtue of an execution subsequently delivered.

Code Civ. Proc., secs. 1405, 1406.

### 255.

Yes. "The mere bringing of a former action upon the same state of facts does not necessarily preclude a party from bringing a second action, and the institution by a party of a fruitless action, which he has not the right to maintain, will not preclude him from asserting the rights he really possesses."

McNutt v. Hilkins, 80 Hun, 235.

### 256.

Yes. A defendant in order to avail himself of the defense of the statute of limitations is required in all cases to plead it.

Code Civ. Proc., sec. 413.

Minzesheimer v. Bruns, 1 App. Div. 324.

Hulbert v. Clark, 128 N. Y. 295.

Sage v. Culver, 147 N. Y. 241.

### 257.

The entire crop belongs to the landlord, who is not liable for the value of the seed.

The tenant knew that his lease expired on April 1, 1902, and he planted the wheat knowing it could not be harvested until after the expiration of his lease.

Reeder v. Sayre, 70 N. Y. 180.

## 258.

The deed is valid as to the two first life estates, *viz.*, those of B and C. On the death of C, G takes the fee. The estates subsequent to those of the two persons first entitled thereto are void, and on the death of those persons, the remainder takes effect in the same manner as if no other life estates had been created.

Real Property Law (chap. 547, Laws 1896), sec. 33.

## 259.

D's unrecorded mortgage takes precedence over A's deed. A had actual notice of D's mortgage, and that takes the place of the notice presumed by the recording acts.

Real Property Law (chap. 547, Laws 1896), sec. 241, and cases cited in Logan R. P. Law, pp. 88, 89, 90.

## 260.

A wins. "A common carrier is bound to exercise reasonable care and prudence in the transportation of property, and is liable for loss resulting from a failure in this respect, although by his contract the transportation is at 'the owner's risk.'"

Canfield v. B. & O. R. R. Co., 93 N. Y. 532.

Kenney v. N. Y. C. & H. R. R. Co., 125 N. Y. 425.

## 261.

Yes; C can recover.

"Where one party proposes by mail a contract with another residing at a distance, and the latter accepts it and deposits his acceptance in the post-office, addressed and to be transmitted to the former, the contract is complete.

"The party may make it a condition that the proposed contract shall not be obligatory upon him until he receives notice of its acceptance, or unless he receives such notice by a spe-

cified time; but if he do not, the contract is binding on him from the time the acceptance is deposited for transmission to him by mail, although he never receive it."

Vassar v. Camp, 11 N. Y. 441.

Watson v. Russell, 149 N. Y. 391.

C. P. I. Co. v. A. Ins. Co., 127 N. Y. 618.

### 262.

B and C can compel A to account to the firm for the value of the lease taken in his own name, which inures to the benefit of the firm.

"One member of a copartnership cannot during its existence, without the knowledge of his copartners, take a renewal lease for his own benefit, of premises leased by the firm, upon which it has made valuable improvements, and by the joint efforts of the members made the good will valuable and enhanced the rental value of the premises, and this although the term of the renewal lease does not begin until after the copartnership has expired by its own limitations."

Mitchell v. Reed, 61 N. Y. 123.

Britton v. Ferrin, 171 N. Y. 244.

Robinson v. Jewett, 116 N. Y. 51, 52.

Butler v. Prentiss, 158 N. Y. 49.

### 263.

Judgment for the creditor. C is liable as a partner for the reason that he was interested in the profits of the business *as profits* and not as a means of compensation.

Leggett v. Hyde, 58 N. Y. 272.

Orvis v. Curtiss, 157 N. Y. 657.

Magovern v. Robertson, 116 N. Y. 65.

First Nat. Bank v. Gallaudet, 122 N. Y. 655.

### 264.

C wins. B by taking an assignment of all the maker's property, before maturity, for the express purpose of meeting the note, or for his protection against the same, impliedly

waives his right to a notice of dishonor upon the ground that he had obtained everything which notice was intended to enable him to obtain.

Merchants' Bank v. Griswold, 7 Wend.  
165, 166.

Eaton & Gilbert on Com. Paper, p. 523,  
and cases cited.

265.

B wins.

"Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon."

Nego. Inst. Law (chap. 612, Laws 1897),  
sec. 324.

Eaton & Gilbert on Com. Paper, p. 635.  
First Nat. Bank v. Leach, 52 N. Y. 350.  
Thomson v. Bank, 82 N. Y. 1.

266.

No, the defense is not good.

It was A's duty to have disclosed, at the time the property was knocked down to him, or when he paid the 10 per cent., the name of his principal, not having done so he is personally liable on the contract.

McComb v. Wright, 4 Johns. Ch. 659.

Cobb v. Knapp, 71 N. Y. 348.

McClure v. Cent. Trust Co., 165 N. Y.  
110, 128.

De Remer v. Brown, 165 N. Y. 410.

267.

A can recover. C had no actual authority to collect the note, and its mere possession unindorsed did not vest him with apparent authority nor authorize payment to him.

Doubleday v. Kress, 50 N. Y. 410.

Wangner v. Grimm, 169 N. Y. 429.

## 268.

Demurrer sustained.

The bank was not privy to the fraud and Roe was not discharged thereby.

Coleman v. Bean, 1 Abb. Ct. App. Dec. 394.

## 269.

A is right and C is liable as surety for the rent of the extended term.

The holding over was continuous and under the lease, the stipulated rent of which C guaranteed.

Dufau v. Wright, 25 Wend. 636.

Rice v. Loomis, 139 Mass. 302, 1 N. E. 548.

## 270.

Judgment for the X Company.

The fire having occurred through the wrongful and criminal act of B, A had the primary right of indemnity against him or against the insurance company and could collect of either, but having first collected of B, he cannot have a second satisfaction of the insurance company.

Clement on Fire Insurance, p. 363.

16 Am. & Eng. Encyc. of Law (2d ed.), p. 841.

Connecticut Fire Ins. Co. v. Erie R. R. Co., 73 N. Y. 399.

## 271.

A wins. The insurance company probably defended on the ground that the policy was a wager policy; but it was not. A had an insurable interest in the life of B at the time of the taking out of the policy to the amount of \$20,000, the value of his bonds then in B's possession, which B might lose, steal or destroy. Under the circumstances it

was not necessary that A should have been damnified by B's death.

Steinback v. Diepenbrock, 158 N. Y. 30.  
 Ferguson v. Mass. Mut. Life Ins. Co., 32 Hun, 306, 311; affd., 102 N. Y. 647.  
 Cook on Life Insurance, pp. 101, 102, 103.

## 272.

A wins. Bailor and bailee.

The contract was entire, to saw the 100 logs, and then each was to have half of the boards sawed out of the same. Until the contract was completed the title to the boards and logs unsawed remained in A. When B sold the boards in question he was guilty of conversion and liable to A for their value.

Pierce v. Schenck, 3 Hill, 28.  
 Mack v. Snell, 140 N. Y. 193.

## 273.

Judgment for B. Bailor and bailee.

The moment A drove the horse beyond the village of C, he transcended his contract of hire and became liable for all damages absolutely, although caused by inevitable accident or without his fault.

7 Am. & Eng. Encyc. of Law (2d ed.),  
 p. 312.  
 3 idem., p. 753; 5 Cyc. 176.

## 274.

To B. The title to the horse passed to B on delivery; the act of returning the same within the ten days was a condition subsequent, which might, if performed, have defeated the title vested, but as it was not duly exercised B forfeited the right and the sale became absolute. C had the right to levy and sell the horse under the circumstances narrated.

Costello v. Herbst, 18 Misc. 179.  
 21 Am. & Eng. Encyc. of Law (1st ed.),  
 p. 647.

## 275.

Judgment for the jeweler. On A's refusal to give his note as agreed, the sale became absolute and the debt for the same became due forthwith.

*Corlies v. Gardner*, 2 Hall (N. Y.), 345.  
21 Am. & Eng. Encyc. of Law (1st ed.), 639.

## 276.

The Court should exclude the evidence. What A heard the bystanders say after the accident, and in the absence of the flagman, was clearly hearsay and irrelevant.

*Felska v. N. Y. C. R. R. Co.*, 152 N. Y. 339.

## 277.

The Court should exclude the evidence. It does not appear therein that the declarant was conscious of impending death, and was without expectation or hope of recovery. The fact that the attending physician knew that A was about to die, does not establish the condition of A's mind or that he had given up all hope of life when he made the statements.

*Stephen's Dig. Law of Ev.* (Beers' N. Y. ed.), arts. 26, 97, pp. 131, 372.  
*People v. Chase*, 79 Hun, 296; affd., 143 N. Y. 669.

## 278.

The testimony should be admitted. The customer having expressly referred the merchant to the cartman for information in regard to the matter in dispute, is bound by the latter's declarations in the same manner and to the same extent as if they were made by himself.

1 Greenleaf's Ev., sec. 182.

1 Encyc. of Ev., p. 561.

*Stephen's Dig. of Law of Ev.* (Beers' N. Y. ed.), art. 19, p. 113.

*Lehman v. Frank*, 19 App. Div. 442.

## 279.

On proof by your client that he has no present recollection of the items, independent of the memorandum, and that the memorandum is correct and was made by him when the transaction was fresh in his mind, the same can be used to refresh his memory, in connection with and as auxiliary to the oral testimony of the witness.

Cowen's Treat., vol. 2 (5th ed.), sec. 1474.

Stephen's Dig. of Law of Ev. (Beers' N. Y. ed.), art. 136, p. 461.

Halsey v. Sinsebaugh, 15 N. Y. 485.

Marley v. Shults, 29 N. Y. 346, 351.

Howard v. McDonough, 77 N. Y. 592.

Wise v. Phoenix, 101 N. Y. 637.

Russell v. Hudson R. R. Co., 17 N. Y. 134.

People v. McLaughlin, 150 N. Y. 392.

Nat. Ulster Co. Bank v. Madden, 114 N. Y. 284.

Wilson v. Kings Co. E. R. R. Co., 114 N. Y. 498.

## 280.

The objection should be sustained. The slander consisted in stating generally that the plaintiff was a thief, and evidence of general reputation in that regard is alone competent; defendant cannot prove specific acts under the circumstances stated.

1 Greenleaf on Ev., sec. 55.

Hilton v. Carr, 40 App. Div. 490, 493.

Hart v. McLaughlin, 51 App. Div. 413.

People v. Greenwald, 108 N. Y. 301.

## 281.

**Yes.** The previous expression or formation of an opinion or impression by a juror in reference to the guilt or innocence of the defendant or a present opinion or impression in reference thereto, is not a sufficient ground of challenge.

for actual bias, to any person otherwise legally qualified, if he declare on oath that he believes that such opinion or impression will not influence his verdict, and that he can render an impartial verdict according to the evidence, and the Court is satisfied that he does not entertain such a present opinion or impression as would influence his verdict.

Endeavor by examination of the juror to have him declare himself within that rule.

Code Crim. Proc., sec. 376.

### 282.

A was guilty of assault in the second degree. He pointed a loaded pistol at complainant, who was at the time within shooting distance, with intent to do bodily harm.

Penal Code, sec. 218.

People v. Conner, 53 Hun, 353.

People v. Ryan, 55 Hun, 214.

### 283.

Yes. Upon the trial of an indictment a prisoner may be convicted of the crime charged therein or of a lesser degree of the same crime. Larceny is an element of robbery, which is but larceny by force, violence or fear, and the jury had the power to convict of larceny from the person if it saw fit so to do.

People v. Murphy, 3 Hun, 114.

2 Bish. Crim. Law (8th ed.), sec. 1156.

Penal Code, secs. 35, 224.

### 284.

Although the person injured was a trespasser, he was not an outlaw who could be willfully killed or injured. The railroad company owed him the obligation not to injure him by active misconduct or wantonness; it must not be grossly negligent, other than that the railroad company owed him no duty of care or vigilance. The question assumes that the presence of the trespasser was unknown, and could not have been reasonably anticipated, otherwise the railroad company

would be required to exercise reasonable care to prevent injury.

*Vide* 21 Am. & Eng. Encyc. of Law (2d ed.), 472.

Sterger v. Van Sicklen, 132 N. Y. 499.  
Walsh v. F. R. Co., 145 N. Y. 301.

### 285.

The law does not fix any arbitrary period (in civil actions) when an infant is deemed capable of exercising judgment and discretion, that is, when it becomes *sui juris*. "It depends upon many things, such as natural capacity, physical conditions, training, habits of life and surroundings. These and other circumstances enter into the question. It becomes, therefore, a question of fact for the jury where the inquiry is material," as it does in this case, the infant being seven years of age.

Stone v. Dry Dock, etc., 115 N. Y. 109,  
110.

Tucker v. N. Y. C., 124 N. Y. 316.

### 286.

A cannot recover. B was under no legal obligation to disclose his special knowledge as to the whereabouts of the lost horse; he was under no special obligation by confidence reposed or otherwise, and had no legal relation either to A or to the animal. He said or did nothing to mislead A, who sold at his own risk, and cannot recover.

Bench v. Sheldon, 14 Barb. 66.

### 287.

Yes. The widow was not put to her election and was entitled to dower in addition to the provisions made for her in the will.

"Dower is never excluded by a provision for the wife except by express words or necessary implication. Where there are no express words there must be on the face of the will a demonstration of the intent of the testator that the

widow shall not take both dower and the provision. Such demonstration is furnished only where there is a clear incompatibility arising on the face of the will, between a claim of dower and a claim to the benefit of the provision. The intention to put the widow to an election between dower and the provision may not be inferred from the extent of the provision."

Konvalinka v. Schlegel, 104 N. Y. 125.

Kimbel v. Kimbel, 14 App. Div. 570.

Closs v. Eldert, 30 App. Div. 339.

Matter of Grotrian, 30 Misc. 23.

Matter of Gordon, 172 N. Y. 25.

Horstman v. Flege, 172 N. Y. 381.

### 288.

The grandchildren born before the death of A take the entire estate, each one-quarter, to the exclusion of the grandchild born after his death. Title vested at testator's death to those then in being.

Doubleday v. Newton, 27 Barb. 431.

### 289.

B, as an heir-at-law and person interested in the probate of the will, may bring an action in the Supreme Court for the county in which probate was had, to determine the validity or invalidity of the probate. The action is triable by a jury and must be commenced within two years after the will has been admitted to probate, except that persons within the age of minority, of unsound mind, imprisoned or absent from the State, may bring such action two years after such disability has been removed.

Code Civ. Proc., sec. 2653a.

### 290.

No. A cannot recover. He knew that the stock had reached \$150 a share, the price at which he had instructed his brokers to sell, who told him at that time that they had not sold, for the reason that the market looked strong and they thought the stock would reach a higher price. The

principles of natural justice required A at that time to have spoken concerning the broker's determination to hold for a higher price and to have forbidden it if he did not approve. He could not wait events to determine whether the broker's course would result advantageously or otherwise and then speak and make his election. He is now estopped. "He who has been silent as to his alleged rights when he ought, in good faith, to have spoken, shall not be heard to speak when he ought to be silent."

Vol. XI Am. & Eng. Encyc. of Law (2d ed.), pp. 427, 428.

Hope v. Lawrence, 50 Barb. 258.

291.

No; the action is in affirmance of an unlawful contract. "A court of equity will not determine the respective rights and interests of persons arising out of an unlawful agreement, but will leave the parties where it finds them in all cases where the action is in affirmance of such an agreement."

Unckles v. Colgate, 148 N. Y. 529.

292.

If the injured person was induced to settle his cause of action by reason of the fraud or deceit of the attorney of the railroad company, he can bring an action in equity to rescind the contract, but the court will require the *status quo* to be restored before relief will be granted. He will be compelled to pay back what he received on the settlement, or tender it and keep the tender good. "He who seeks equity must do equity."

Vandervelden v. Chicago & N. W. Ry. Co., 61 Fed. Rep. 54.

Vol. 11 Am. & Eng. Encyc. of Law (2d ed.), p. 160.

293.

The city has no remedy; the contract was *ultra vires* and unexecuted upon both sides.

"Contracts of corporations are *ultra vires* when they involve adventures outside of and not within the scope or powers given by their charter. The defense of *ultra vires* is available to the corporation in all cases of executory contracts, unless it would defeat justice or accomplish a legal wrong."

Jemison v. C. S. Bank, 122 N. Y. 135.  
Bath Gas Light Co. v. Claffy, 151 N. Y. 31.  
Vought v. East Bldg. & Loan Assn., 172 N. Y. 518.

#### 294.

No; the attorney will not recover. The contract was fraudulent and void under the statute, which declares that "when the directors of any corporation for the first year of its corporate existence shall hold over and continue to be directors after the first year, because of their neglect or refusal to adopt the by-laws required to enable the stockholders to hold the annual election for directors, all their acts and proceedings while so holding over, done for and in the name of the corporation, designed to charge up on it any liability or obligation for services of any such director, or any officer, or attorney or counsel appointed by them, and every such liability or obligation shall be held to be fraudulent and void."

Stock Corp. Law (Laws 1890, chap. 564),  
sec. 22.

#### 295.

By applying to an Appellate Division of the Supreme Court, held in the Department, in which it is proposed to construct the road, for the appointment of three commissioners to determine whether such railroad ought to be constructed and operated.

Railroad Law (Laws 1890, chap. 565),  
sec. 94.

## 296.

The wife has no rights under the circumstances stated. The money which the wife saved without her husband's knowledge out of the money which he furnished to her for the sole purpose of paying the running expenses of the house, which was the husband's obligation, was and remained his property, and the horse, carriage and harness which she bought therewith were his property also and subject to levy and sale under an execution against him.

Aaronson v. McCauley, 46 St. Rep. 564.

## 297.

A and B, the husband and wife, were tenants by the entirety of the real estate; this tenancy is founded upon the marital relation, and was severed by the divorce *a vinculo*, and each thereupon took a fee in one-half share of the real estate as tenants in common.

Stelz v. Shreck, 128 N. Y. 263.

Jooss v. Fey, 129 N. Y. 201.

B has no dower in her husband's share, the divorce having been granted to the husband.

Code Civ. Proc., sec. 1760.

On the death of A his son, D, takes the fee of his father's one-half, subject to the dower right of his mother, C.

Real Property Law (chap. 547, Laws 1896), sec. 281.

## 298.

The charge is not correct. It does not state the rule governing the husband's liability for the torts of his wife of the character set forth in the question. It is statutory and as follows:

"Her husband is not liable for such acts (torts named including injuries to the person) unless they were done by his actual coercion or instigation; and such coercion or instigation shall not be presumed, but must be proved."

Dom. Rel Law (Laws 1896, chap. 272), sec. 27.

## 299.

The entire assets must be first applied to the payment of its outstanding bills.

"In case of the insolvency of any bank or banking association, the bill holders thereof shall be entitled to preference in payment, over all other creditors of such bank or association."

N. Y. Const. of 1894, art. VIII, sec. 8.

## 300.

The appellant succeeds. The jury, which was the exclusive judge of all questions of fact, acquitted the prisoner, and the presiding judge had no power to set the verdict aside as against the weight of evidence, nor could he be again tried for that would put him twice in jeopardy.

Code Crim. Proc., secs. 419, 420.

Penal Code, sec. 36.

N. Y. Const., art. 1, sec. 6.

People v. Dowling, 84 N. Y. 478.

People v. Cignarale, 110 N. Y. 27.

People v. McCarthy, 110 N. Y. 315.

## 301.

..... COURT.

TRIAL DESIRED IN ..... COUNTY.

A, Plaintiff, <i>against</i> B, Defendant.	} Summons.
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To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your

failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, . . . . ., 190..

. . . . ., Plaintiff's Attorney,  
Office address, . . . . ., N. Y.  
Post Office address, . . . . ., N. Y.  
(Code Civil Procedure, sec. 418.)

**Indorsement upon summons:**

"According to the provisions of section . . . . of chapter 20 of the Laws of 1900, known as the Forest, Fish and Game Law" (or as the case may be).

The summons is in the usual form, except "in an action to recover a penalty or forfeiture, given by a statute, if a copy of the complaint is not delivered to the defendant with a copy of the summons, a general reference to the statute must be indorsed upon the copy of the summons so delivered, in the following form: 'According to the provisions of,' etc.; adding such a description of the statute, as will identify it with convenient certainty, and also specifying the section, if penalties or forfeitures are given, in different sections thereof, for different acts or omissions."

(Code Civil Procedure, sec. 1897.)

**302.**

No. After a partnership has been dissolved by mutual consent or otherwise, a member of the partnership can compound for a partnership debt and be exonerated therefrom by a release of the indebtedness or other instrument exonerating him therefrom executed by the creditor to the compounding debtor. Such an instrument does not impair the creditor's right of action against the other members of the firm or his right to take any proceedings against the latter. B, however, may make any defense or counterclaim or have any other relief against X to which he would have been entitled, if the composition had not been made, and may require A to contribute his ratable proportion of the partnership debts, as if he had not been discharged.

(Code Civil Procedure, secs. 1942, 1944.)

## 303.

B's plea is not good. The demands mentioned were reciprocal, and the accounts were "mutual, open and current."

"In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item, proved in the account on either side."

(Code Civil Procedure, sec. 386.)

The six years' limitation (Code Civil Procedure, sec. 382, subd. 1) began to run from January 1, 1899, the date of the last item in A's account. The action was commenced January 1, 1904.

## 304.

Twenty days after the publication for six weeks is complete.

"For the purpose of reckoning the time within which the defendant must appear or answer, service by publication is complete upon the day of the last publication, pursuant to the order; and service made without the state is complete upon the expiration thereafter of a time equal to that prescribed for publication."

Code Civil Procedure, sec. 441.

*Vide* also section 440.

Market Nat. Bank v. Pacific Nat. Bank,  
89 N. Y. 397.

## 305.

Defendant further answering said complaint, alleges that the plaintiff herein is not a corporation.

"In an action, brought by or against a corporation, the plaintiff need not prove, upon the trial, the existence of the corporation, unless the answer is verified, and contains an affirmative allegation that the plaintiff, or the defendant, as the case may be, is not a corporation."

(Code Civil Procedure, sec. 1776.)

## 306.

Apply to the court upon notice to both claimants for an order to substitute the claimant who has not sued, as the party defendant in the action in the place and stead of the railroad company and to discharge it from liability upon its paying into court the sum of money found. It is called "Interpleader by Substitution on Order" and is provided for by section 820 of the Code of Civil Procedure. An action of interpleader can also be maintained in certain cases. The cases are numerous. *Vide* generally:

Baltimore & Ohio R. R. Co. v. Arthur,  
90 N. Y. 234.

Bassett v. Leslie, 123 N. Y. 396.

Hirsch v. Mayer, 165 N. Y. 236.

Bernstein v. Hamilton, 26 App. Div.  
206.

Stevenson v. N. Y. Life, 10 App. Div.  
233.

Wells v. National City Bank, 40 App.  
Div. 498.

Beebe v. Mead, 101 App. Div. 500.

## 307.

"Where any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause as to be untenanted, and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his fault or neglect, quit and surrender possession of the leasehold premises, and of the land so leased or occupied; and he is not liable to pay to the lessor or owner, rent subsequent to the time of the surrender."

Real Property Law (Chapter 547, Laws  
1896), sec. 197.

Fowler's Real Property Law (2d ed.),  
p. 626.

## 308.

B is not liable. The landlord made no reply to the tenant's letter. He said nothing; nor did he notify the tenant that he

would hold him for the rent and that he would lease the premises for his benefit. He accepted surrender and relet on his own responsibility and cannot recover the rent thereafter accruing.

Underhill v. Collins, 132 N. Y. 269.  
Gray v. Kaufman Dairy & I. C. Co., 162  
N. Y. 388.  
Crane v. Edwards, 80 App. Div. 333.

### 309.

B is liable for the rent. The tenant in possession of the demised premises wrongfully withheld the same from both A and B.

"It is the acceptance of a lease, not the acceptance or occupation of the premises, that creates the liability under a covenant to pay rent contained in the lease.

"The extent of the landlord's implied agreement is that he has a good title and can give a free and unencumbered lease for the term demised, and if the tenant is kept out of possession by the act of any party other than the landlord, *he must resort to his proper remedy to get possession under the lease.*"

Smith v. Barber, 96 App. Div. 236.  
Mirsky v. Horowitz, 46 Misc. 257.

### 310.

Judgment for A. Contract void under the statute of frauds.

Personal Property Law, chapter 417,  
Laws 1897 (sec. 21, subd. 6).  
Bennett v. Hull, 10 Johns. 364.

### 311.

Judgment for A, under the rule that where a contract is made for the sale and delivery of specified articles of personal property, and the title does not pass to the vendee, the vendor is not liable if the property is destroyed by accident without his fault, so that delivery becomes impossible. The basis of this doctrine is, that there is an implied condition

in the contract itself, the effect of which is to relieve the party where, without his fault, performance becomes impossible.

- Dexter v. Norton, 47 N. Y. 62.
- Kein v. Tupper, 52 N. Y. 550, 556.
- Goldman v. Rosenberg, 116 N. Y. 78.
- Stewart v. Stone, 127 N. Y. 500, 507.
- Lorillard v. Clyde, 142 N. Y. 456, 462.
- Herter v. Mullen, 159 N. Y. 38, 43.

### 312.

A was liable. By the agreement he had an interest in the profits as such, which were the result of the capital and industry in which the firm was engaged, and as to the creditors of the firm he was a partner and jointly liable for the partnership debts.

- Leggett v. Hyde, 58 N. Y. 272.
- Manhattan Brass & Mfg. Co. v. Sears, 45 N. Y. 797.
- Hackett v. Stanley, 115 N. Y. 625, 630.
- Magovern v. Robertson, 116 N. Y. 61, 65.
- Bank v. Gallaudet, 122 N. Y. 655.
- Orvis v. Curtiss, 157 N. Y. 657, 662.

### 313.

The exception was not well taken. Where a fraud is perpetrated by one of the members of a firm in the transaction or prosecution of a copartnership enterprise, they are all liable, although the others had no connection with, knowledge of, or participation in the fraud.

- Chester v. Dickerson, 54 N. Y. 1.
- Parsons on Partnership, secs. 100, 102.
- Griswold v. Haven, 25 N. Y. 595.
- Strang v. Bradner, 114 U. S. 555.

### 314.

Judgment for C. The bonds when presented and transferred to A had no indorsement thereon by the payee and

hence were nonnegotiable. Nor was the person presenting them the apparent owner, and not being the apparent owner he could not give a good title even to a *bona fide* purchaser for value.

Colson v. Arnot, 57 N. Y. 253, cited in  
Bank v. Bank, 170 N. Y. 65.

### 315.

Judgment for C. The reasons are, that as B had an opportunity to know what he signed, but relied upon the statement of A without examination, he was, as to a *bona fide* holder for value, bound by his act and estopped from claiming that he intended to sign an entirely different obligation. In other words, his negligence was no defense, and the burden was upon B of showing that he was guilty of no laches or negligence.

Chapman v. Rose, 56 N. Y. 137.  
Dutchess Co. Mut. Ins. Co. v. Hachfield,  
73 N. Y. 226.

### 316.

A should recover, as M had no authority either actual or apparent as agent of A to receive the principal due on the note, and as it was not indorsed, A was not bound by the action of M.

Doubleday v. Kress, 50 N. Y. 410.  
Smith v. Kidd, 68 N. Y. 130.  
Brewster v. Carnes, 103 N. Y. 556.  
Crane v. Gruenewald, 120 N. Y. 274.  
Central Trust Co. v. Folsom, 167 N. Y.  
287, 285.

### 317.

A was entitled to judgment as B did not claim to own the stock, but only to be acting as agent, and as he had no authority, actual or apparent, to pledge the same, A was not estopped from asserting his title. While the transfer and power of attorney gave B an apparent ownership in case he had claimed title or an apparent authority to sell as agent,

it did not hold him out as authorized to make a loan or pledge the stock.

Bank v. Livingston, 74 N. Y. 223.  
 Talmage v. Third Nat. Bank, 91 N. Y. 533.  
 Shaw v. S. H. N. Co., 144 N. Y. 220, 224.

### 318.

D is not liable. He became surety for the firm of A and B. The death of B dissolved the firm and terminated his liability.

Manhattan Gas Light Co. v. Ely, 39 Barb. 174.  
 2 Pars. on Contracts, \*\*, 19, 20.  
 Staats v. Howlett, 4 Denio, 559.  
 Vol. 27 Am. & Eng. Encyc. Law (2d ed.), 459.  
 Brandt, Suretyship, Guaranty (3d ed.), sec. 416; n. 3, sec. 438.

### 319.

B can recover from D one-half of the amount paid by him. At law a surety can recover of his co-surety only his proportion even when one of the sureties has become insolvent, but in a suit in equity against all the co-sureties, under proof of insolvency, the payment of the amount will be adjudged among the solvent parties in due proportion.

Easterly v. Barber, 66 N. Y. 433.  
 Kimball v. Williams, 51 App. Div. 616, 617.  
 Am. & Eng. Encyc. Law, Vol. 27, p. 485 (2d ed.).

### 320.

B can recover. He had an insurable interest in the house because his agreement with A was enforceable.

2 Parsons on Contracts, \*438.  
 3 Kent's Com. \*371.  
 Richards on Insurance, 34.

321.

The insurance company is liable. First, B had an insurable interest in the life of A. Second, the act stipulated against, death by his own hand or act, "voluntary or otherwise," is not against accidental death, but covers intentional death; suicide, whether sane or insane.

Penfold v. Universal Life Ins. Co., 85  
N. Y. 317.

322.

The guest can recover. The innkeeper was an insurer of the safety of the property of his guest brought *infra hospitum*.

Hulett v. Swift, 33 N. Y. 571.  
Wilkins v. Earle, 44 N. Y. 172.  
Mowers v. Fethers, 61 N. Y. 38.  
Adams v. N. J. Steamboat Co., 151 N. Y.  
166. *Vide*, L. 1855, ch. 421, sec. 1, as  
amended L. 1897, ch. 305.

323.

The railroad company is liable. An accidental fire not caused by lightning is no excuse to a common carrier nor is it within the exception as an act of God.

2 Kent's Com., \*602.  
Miller v. Steam Navigation Co., 10 N. Y.  
431.  
Chamberlain v. The Western Trans. Co.,  
44 N. Y. 307.  
Lamb v. Camden & Amboy R. R. Co., 46  
N. Y. 286, 287.

324.

A is entitled to pay from C. B and C have no rights. Loss falls on B and C. Nothing remained to be done by the seller and delivery was complete.

Gerard v. Prouty, 34 Barb. 454 (affd.  
41 N. Y. 619).

325.

B was entitled to recover. The express warranty survived acceptance.

"Where a machine has been delivered to the vendee under an executory contract of sale, with an express warranty of its capacity, without any agreement as to its retention or return, the vendee does not lose his right to recover damages for the breach of the warranty by returning the machine after discovering its inefficiency."

Hooper v. Story, 155 N. Y. 171.

Miller v. Patch Mfg. Co., 101 App. Div. 22.

### 326.

The court should admit the evidence. Plaintiff had the right to contradict his own witness; contradiction is not impeachment.

"There is a difference between introducing evidence to establish a particular fact contrary to that testified to by a party's witness and evidence introduced to impeach a witness, and we are persuaded that under the law the defendant had a right to contradict the plaintiff in regard to the material facts in this case, although he has weakened his case by bringing out the evidence of the plaintiff under his assurance that she was worthy of belief. (See 1 Greenleaf Evidence (13th ed.), sec. 443; Hunter v. Wetsell, 84 N. Y. 549, 556, and authorities there cited; Becker v. Koch, 104 N. Y. 394, 401, and authorities there cited.)"

Ruhl v. Heintze, 97 App. Div. 446.

### 327.

Serve on the president or other head of the corporation or the officer of the company in whose custody the books of account are a subpoena *duces tecum*, at least five days before the day he is required to attend, requiring the production upon the trial of the books of account. Serve upon the president personally a subpoena without a *duces tecum* clause. The production of the books can also be compelled by an order requiring their production upon the trial.

Code of Civil Procedure, secs. 867, 868, 869.

Pay to each person subpoenaed fifty cents for one day's attendance, and if he resides more than three miles from the place of attendance, eight cents for each mile going to the place of attendance.

Code of Civil Procedure, sec. 852, 8318.

328.

The court should admit the evidence. X was not a party to the agreement, and was in no way connected with it. The action was not on the agreement nor between the parties thereto.

"The rule that where an agreement is reduced to writing, it cannot be controverted or varied by parol evidence, applies only to the parties to the agreement; one not connected in any way with the agreement may show by parol what the real transaction was."

Brown v. Thurber, 77 N. Y. 613.

Folinsbee v. Sawyer, 157 N. Y. 199.

329.

The court should admit the testimony.

It was competent as tending to show a fraudulent intent.

Chisholm v. Eisenhuth, 69 App. Div. 134.

330.

The court should overrule the objection.

The conviction may be proved for the purpose of affecting the weight of X's testimony either by the record or by his cross-examination upon which X (the witness) must answer any proper question relevant to that inquiry, but the party cross-examining is not concluded by the answer to such question.

Penal Code, sec. 714.

Code Civil Procedure, sec. 832.

331.

Yes. Guilty of a misdemeanor; of conspiring to commit the crime of burglary. No overt act was necessary under the circumstances disclosed.

"No agreement except to commit a felony upon the per-

son of another, or to commit arson or burglary, amounts to a conspiracy, unless some act beside such agreement be done to effect the object thereof, by one or more of the parties to such agreement.”

Penal Code, secs. 171, 168.

Code Criminal Procedure, sec. 398.

332.

Judgment and sentence invalid.

“When the defendant appears for judgment, he must be asked by the clerk whether he have any legal cause to show why judgment should not be pronounced against him.”

Code Criminal Procedure, sec. 480.

Allocution is necessary.

Messner v. People, 45 N. Y. 1.

People v. McClure, 148 N. Y. 101.

Ball v. U. S., 140 U. S. 118.

333.

The refusal to charge as requested was erroneous.

Intent is a necessary factor in the crime of murder, and the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act and consequently the grade or degree of his crime.

Penal Code, sec. 22.

People v. Corey, 148 N. Y. 476.

334.

Judgment for B. An action will lie for a false representation made as to an existing fact, with fraudulent intent, where a direct injury results therefrom, and where a contract would have been fulfilled but for the fraudulent representations of a third person, although it could not have been enforced.

Benton v. Pratt, 2 Wend. 385.

Rice v. Manley, 66 N. Y. 82, 85.

Rich v. N. Y. C. & H. R. R. Co., 87 N. Y. 382, 399..

New York L. I. Co. v. Chapman, 118 N. Y. 288, 294.

335.

Judgment for M. The removal of the gates did not work such a forfeiture as to justify an assault and battery by B to prevent the continued use of the way, and the right of way carried with it the incidental right to make necessary repairs.

McMillian v. Cronin, 75 N. Y. 474.

Bristor v. Burr, 120 N. Y. 427, 431.

336.

The company was liable. It had a right to make a rule that a passenger should procure a ticket before entering the cars and deliver it up at the end of his passage, but it had no right to establish and enforce a regulation that if he did not pay or deliver a ticket he should be detained and imprisoned until he did, as he was at most a mere debtor and his debt could not be enforced by imprisonment.

Lynch v. Met. Railroad Co., 90 N. Y. 77.

Avery v. N. Y. C. & H. R. R. Co., 121 N. Y. 31, 34.

Craven v. Bloomingdale, 171 N. Y. 439, 449.

337.

The heirs-at-law should recover. The devise having been invalid and therefore ineffective, the testator as to his real estate died intestate, and upon his death it vested in his heirs-at-law under the statute of descent, and words of disinheritance in his will were insufficient to deprive them of their title. It could be affected only by a legal devise of the property.

Gallagher v. Crooks, 132 N. Y. 338.

Chamberlain v. Taylor, 105 N. Y. 193.

Herzog v. The Title Guaranty & Trust Co., 177 N. Y. 97, 98.

Pomroy v. Hincks, 180 N. Y. 73.

338.

It was sufficiently signed under the statute which requires it to be signed at the end thereof. The testator by signing

below the attestation clause made it a part of his will, and therefore the subscription was at the end of the will and in compliance with the statute.

Younger v. Duffie, 94 N. Y. 535.  
Matter of Laudy, 161 N. Y. 429, 432.

## 339.

Judgment should be for A and C. Under the will A acquired a life estate and C a vested remainder, which constituted a valid title. The words "from and after" or other words or phrases denoting time in a devise of a remainder limited upon a particular estate determinable on an event that must happen relate merely to the time of the enjoyment of the estate and not to the time of its vesting, especially in devises of real estate.

Moore v. Lyons, 25 Wend. 119.  
Livingston v. Greene, 52 N. Y. 118.  
Ackerman v. Gorton, 67 N. Y. 63, 66.  
Nelson v. Russell, 135 N. Y. 137.  
Connelly v. O'Brien, 166 N. Y. 406.  
Lewis v. Howe, 174 N. Y. 346.

## 340.

While the farm is in the hands of the vendee, A has a vendor's lien upon the farm for the unpaid purchase price, and the taking of a promissory note therefor did not affect the lien.

Garson v. Green, 1 Johns. Ch. 308.  
Fisk v. Porter, 2 Keyes, 74.  
Chase v. Peck, 21 N. Y. 581, 584.  
Benedict v. Benedict, 85 N. Y. 625.  
Maroney v. Boyle, 141 N. Y. 462.  
Hubbell v. Hendrickson, 175 N. Y. 175.

## 341.

The defense was invalid because A's remedy by an action at law was inadequate and would involve a multiplicity of suits. In an action at law he could recover only the rental

value of the lots, and B might, by paying the judgments obtained therefor, in effect make himself A's tenant against his will, and prevent his enjoyment and improvement of his property.

Wheelock v. Noonan, 108 N. Y. 179.

Tallman v. N. E. R. R. Co., 121 N. Y. 125.

N. Y. C. & H. R. R. Co. v. City of Rochester, 127 N. Y. 591.

### 342.

B could maintain his suit and was entitled to an equitable lien on the property for the amount he invested therein, with a right to sell it, if necessary, to recover that amount. The right of lien was founded upon the agreement and was so far performed that equity would enforce it, and the statute of frauds was no defense.

Smith v. Smith, 125 N. Y. 224.

Sprague v. Cochran, 144 N. Y. 104.

Freeman v. Freeman, 43 N. Y. 34.

### 343.

They applied to the Supreme Court upon notice to the Attorney-General and to such other persons as the court directed, for an order amending the certificate of incorporation.

The General Corporation Law (Laws 1890, chap. 563, as amended by Laws 1892, chap. 687), sec. 7.

### 344.

No; the action will not lie. In the absence of fraud, usurpation or of gross negligence an act *intra vires* is an act of corporate management and a minority of the stockholders cannot question the same. The majority rule, and the courts will leave the dissatisfied minority to redress their grievances through ordinary corporate methods.

10 Cyc. 969.

Cook on Corporations, sec. 684.

Gamble v. Q. C. W. Co., 123 N. Y. 91.

Farmers' L. & T. Co. v. N. Y. & N. R. R. Co., 150 N. Y. 426.

345.

The corporation had no defense because the defense of usury may not be interposed by a corporation.

Laws 1850, chap. 172.

Stewart v. Bramhall, 74 N. Y. 85.

Ludington v. Kirk, 17 Misc. 129.

Hubbard v. Tod, 171 U. S. 501.

346.

The guardian shall lose the custody of the estate and of the ward and shall forfeit to the ward treble damages.

Domestic Relations Law (Laws 1896, chap. 272), sec. 53.

347.

The deed is insufficient for want of the signature of B's former wife. A's former wife need not sign. The judgment of divorce granted to A because of his wife's adultery forfeited her dower; *contra*, as to B's former wife. The marriage contract in her action was not dissolved for her misconduct and she still has dower.

Real Property Law (Laws 1896, chap. 547), sec. 176.

Fowler's Real Property Law (2d ed.), pp. 575, 576, and cases cited.

348.

The marriage of Y and Z is voidable, but is valid until its nullity is declared by a court of competent jurisdiction. Their rights and obligations are those of husband and wife and X has no rights or obligations until their marriage is annulled.

Domestic Relations Law (Laws 1896, chap. 272), sec. 4.

349.

Judgment valid. The amount recoverable in an action to recover damages for injuries resulting in death shall not be subject to any statutory limitation.

Constitution of New York, art. 1, sec. 18.

350.

Objection overruled. Prisoner was confronted with the witness and had an opportunity for his cross-examination. The constitutional right of the defendant to be confronted with the witnesses in a criminal prosecution is involved.

Code Criminal Procedure, sec. 8, subd. 3.

People v. Fish, 125 N. Y. 137, at 151.

Bill of Rights, 1 Rev. Stats. 94, sec. 14.

U. S. Const., VI Amendment.

351.

AFFIDAVIT OF SERVICE.

STATE OF NEW YORK, }  
ALBANY CITY AND COUNTY, } ss.:

John Doe, being duly sworn, deposes and says, that he is more than twenty-one years of age and that on the day of , 190 , at No. 47 Broadway, in the city of Albany, N. Y., he personally served the annexed summons on John Smith, one of the defendants therein named, who is an infant under the age of fourteen years, by delivering to him, said infant, in person a copy thereof and leaving the same with him, and at the same time and place by personally delivering a copy thereof to Peter Smith, his father, and leaving the same with him. Deponent further states that he knew John Smith, so served as aforesaid, to be the person mentioned and described in said summons as defendant therein, and the said Peter Smith to be his father.

(Signed.) JOHN DOE.

Sworn to before me, this .... }  
day of ....., 1905. }

\_\_\_\_\_,  
Commissioner of Deeds,

Albany, N. Y.

Supreme Court Rule, 18.

Code Civil Procedure, sec. 426.

## 352.

D, the defendant, wins. The demurrer should be sustained. The action abated upon the death of C, the wrong-doer, and could not be maintained against his representatives.

Hegerich v. Keddie, 99 N. Y. 258.  
 Moriarty v. Bartlett, 99 N. Y. 651.  
 Brackett v. Griswold, 103 N. Y. 425, 428.  
 Blake v. Griswold, 104 N. Y. 613.  
 Matter of Meekin v. B. H. R. R. Co.,  
 164 N. Y. 151.

## 353.

The objection should be overruled. The defendant under his general denial was entitled to show that there were no dealings between A and B upon which an account could be stated.

Field v. Knapp, 108 N. Y. 87.

## 354.

Judgment for B. C could not recover because not a borrower within the meaning of the usury laws declaring such payment or offer to pay unnecessary as a condition of granting the relief prayed for where the suit is brought by the borrower.

Buckingham v. Corning, 91 N. Y. 525.  
 Allerton v. Belden, 49 N. Y. 373.  
 Wheelock v. Lee, 64 N. Y. 242.

## 355.

The court had jurisdiction to grant the plaintiff's application. The omission of the plaintiff to have a guardian *ad litem* appointed was a mere irregularity and did not affect the jurisdiction of the court.

Rima v. Rossie Iron Works, 120 N. Y.  
 433.

356.

AFFIDAVIT OF MERITS.

(TITLE OF ACTION.)

STATE OF NEW YORK, }  
ALBANY CITY AND COUNTY, } ss.:

John Doe, being duly sworn, deposes and says that he is the defendant in the above-entitled action; that he has fully and fairly stated the case to John Smith, his counsel, who resides at No. 86 State street, Albany, N. Y., and that he has a good and substantial defense on the merits to the action as he is advised by his said counsel after such statement, and verily believes.

(Signed) JOHN DOE.

Sworn to before me, this .... }  
day of ...., 1905. }

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Commissioner of Deeds,  
Albany, N. Y.

357.

No; A could not recover; judgment for B. The contract being executory, an implied warranty of title existed; and upon its failure the purchaser had a right to treat the contract as rescinded, and A could not recover.

Burwell v. Jackson, 9 N. Y. 535.

Whittemore v. Farrington, 76 N. Y. 452,  
453, 457.

Moore v. Williams, 115 N. Y. 586, 592.

Walton v. Meeks, 120 N. Y. 79, 83.

Vought v. Williams, 120 N. Y. 253, 257.

Blanck v. Sadlier, 153 N. Y. 556.

358.

Judgment for B. The agreement of B to advance the money upon the mortgage, and his promise to delay foreclosure, were both dependent upon the undertaking of A to erect and complete the houses, and when he repudiated the further performance of the contract B was discharged from

further obligations, was at liberty to enforce his securities for the money advanced, and previous demand was not necessary.

Ferris v. Spooner, 102 N. Y. 10.

### 359.

Judgment for H. The right to damages for closing the street arose at once although the amount was not fixed and ascertained until after the conveyance by H to B. The right of H to the damages having accrued when the street was closed was a personal right, and when paid it related back to the original debt which accrued at that time. It was not embraced within the deed from H to B, but was a mere right of action not running with the land.

King v. Mayor, 102 N. Y. 171.

Donnelly v. Brooklyn, 121 N. Y. 139.

Sage v. Brooklyn, 89 N. Y. 189.

### 360.

A wins. B made the payment voluntarily and without A's request, and had no legal claim upon A for reimbursement. A's expression of gratitude was not a promise of payment, and even if so considered, it was without legal consideration and void.

Goulding v. Davidson, 26 N. Y. 608.  
9 Cyc. 316, 356.

Renss Glass Factory v. Reid, 5 Cowen,  
588, 619, 620.

Smith v. Ware, 13 Johns. R. 257.  
Beach on Contracts, sec. 153.

The rule of "payment for honor *supra protest*" has no relation to the question.

Eaton & Gilbert on Commercial Paper,  
p. 625.

## 361.

Judgment for plaintiff.

"A hiring at so much a year, no time being specified, is an indefinite hiring; and such a hiring is a hiring at will and may be terminated at any time by either party."

Martin v. Insurance Co., 148 N. Y. 117.

Outerbridge v. Campbell, 87 App. Div. 597.

Hotchkiss v. Godkin, 63 App. Div. 470.

## 362.

Each liable *in solido* for the entire debt. B having contributed his \$50,000 in merchandise and accounts and not "in actual cash payments" is liable as a general partner for the debts of the firm.

Partnership Law (Laws 1897, chap. 420), sec. 30.

Durant v. Abendroth, 69 N. Y. 148.

Hotopp v. Huber, 160 N. Y. 528.

Met. Nat. Bank v. Sirret, 97 N. Y. 326.

## 363.

The judgment is valid as against C as is the levy on the firm property, but the levy under the execution on C's private dwelling-house is not, because he was not served.

"In an action against joint debtors, service of summons on one authorizes judgment against all, which may be enforced by execution against the joint property, although the other defendants are not served and do not appear in the action."

Yerkes v. McFadden, 141 N. Y. 136.

Staiger v. Theiss, 19 Misc. 170.

Schwarzchild v. Mathews, 39 App. Div. 481.

Code Civil Procedure, secs. 1932-1935.

## 364.

Judgment for B. Demurrer sustained.

"The indorsement or assignment of the instrument (note) \* \* \* by an infant passes the property therein

notwithstanding that from want of capacity the \* \* \* infant may incur no liability thereon."

Negotiable Instruments Law (Laws 1897,  
chap. 612), sec. 41.

Eaton & Gilbert on Commercial Paper,  
pp. 48-51.

### 365.

A and B are liable. D and E are not liable.

"Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable."

Negotiable Instruments Law (Laws 1897,  
chap. 612), sec. 80.

Eaton & Gilbert on Commercial Paper,  
p. 352.

### 366.

Judgment for C. A was a general agent for B in buying and selling horses and had implied authority to warrant.

The instructions to A never to warrant were not known to C and did not bind him.

"In the case of a factor or servant of a horse dealer in the habit of making sales, if the factor or servant should be specially instructed in a given instance, the instructions would not be binding if in conflict with the general authority derivable from their occupations."

Cowen's Treatise, Vol. I, secs. 157, 158  
(5th ed.), and cases cited.

Nelson v. Cowing, 6 Hill, 336.

Smith v. Tracy, 39 N. Y. 79.

Bierman v. City Mills Co., 151 N. Y.  
489.

Wait v. Borne, 123 N. Y. 592.

Sandford v. Handy, 23 Wend. 266, 267.

## 367.

The loss falls upon B. X was a commercial agent and sold by sample; he did not have possession of the malt, nor did he make delivery thereof, the latter having been made by his principal.

The parties had had no prior dealings to establish a course of business in regard to paying X; the payment was made after the sale and B knew who the principal was.

X had no authority to collect the money and B must stand the loss.

*Vide:* Higgins v. Moore, 34 N. Y. 417.  
Lamb v. Hirschberg, 1 App. Div. 523.  
Carter v. White Lead Co., 65 App. Div. 476.

Dunn v. Wright, 51 Barb. 244.  
Maxfield v. Carpenter, 65 St. Rep. 587.

## 368.

No; A was not released. The statement of the holder of the note that he would not bother B nor sue him on the note did not constitute a valid contract binding on him and extending the time of payment of the note for ninety days. There was a want of a valid consideration.

"A valid consideration is an essential element of an agreement, after maturity, to extend the time of payment of a promissory note, such as will discharge a surety thereon; and in an action upon the note, if such an agreement is relied upon as a defense, the consideration therefor must be pleaded and proved."

National Citizens' Bank v. Toplitz, 178 N. Y. 464.  
Gahn v. Niemcewicz, 11 Wend. 312.  
Fifth National Bank v. Woolsey, 21 Misc. 761, 762.

## 369.

A, the surety, can recover from C to the extent of the value of the collateral which the latter surrendered to B.

"A surety who pays the debt is entitled to be put in the place of the creditor and to all the means and to every ren-

edy which the creditor possesses to enforce payment from the principal debtor."

- Hayes v. Ward, 4 Johns. Ch. 123.
- Griswold v. Jackson, 2 Edw. Ch. 468.
- Grow v. Garlock, 97 N. Y. 81.
- State Bank v. Smith, 155 N. Y. 197, 200.
- Pitts v. Congdon, 2 N. Y. 352.
- Sternbeck v. Friedman, 23 Misc. 176.
- Am. & Eng. Encyc. Law*, Vol. 27, p. 206 (2d ed.).

### 370.

No; the company is not liable. The house, while not vacant, was unoccupied within the meaning and intent of the policy because it was not, at the time of the fire, a place of abode of human beings or used as such.

- Herman v. Adriatic Fire Ins. Co., 85 N. Y. 162.
- Barry v. Prescott Ins. Co., 35 Hun, 604.
- Huber v. Manchester Fire Assur. Co., 92 Hun, 228.
- Martin v. Rochester German Ins. Co., 86 Hun, 35.
- Couch v. Farmers' Ins. Co., 64 App. Div. 367.
- Thieme v. Niagara Fire Ins. Co., 100 App. Div. 278.

### 371.

Judgment for the insurance company. The policy was void. The insured was guilty of fraud, and knowledge on the part of the agent of the life insurance company of the falsity of the warranty will not relieve the assured from a forfeiture of the policy when the alleged breach of warranty is founded upon a misstatement by the assured in his application.

- Ætna Life Ins. Co. v. France*, 91 U. S. 510.
- Kenyon Case, 122 N. Y. 247.
- Bartean v. Phoenix M. L. Ins. Co., 67 N. Y. 595.
- Cook on Life Insurance, sec. 20, pp. 32, 37.

372.

Judgment for X, the plaintiff. It was the auctioneer's duty to give X immediate notice of the levy and that his title to the property was questioned.

"A factor is bound to assume that his principal is the owner of goods consigned to him for sale, and his allegiance is alone due to his principal. He cannot justify a refusal to pay over the proceeds of such sale on the ground that the same have been seized by virtue of an attachment against a third person \* \* \* of which the principal had no notice."

Barnard v. Kobbe, 54 N. Y. 516.

Rogers v. Weir, 34 N. Y. 463.

373.

Judgment for B. He is not liable at the suit of A for damages, because the transaction was a bailment and the factory, cloth and other material were destroyed accidentally without the fault or negligence of B.

Stewart v. Stone, 127 N. Y. 500.

Sattler v. Hallock, 160 N. Y. 291, at 298.

For the same reasons A is liable to B for the value of his labor expended in completing the trousers not delivered.

Labowitz v. Frankfort, 4 Misc. 275; Id. 624.

Hayes v. Gross, 9 App. Div. 12, at p. 17; affd., 162 N. Y. 610.

Rhodes v. Hinds, 79 App. Div. 383.

374.

Yes. He can begin his action at once without tendering delivery, nor is it necessary for him to await the expiration of the time of performance fixed by the contract.

A was entitled to store the flour for B and sue for the purchase price, or sell the same as B's agent and recover the deficiency, or he could keep the flour as his own and sue for the difference between the contract price and the market

price at the time and place of delivery. He followed the second course and was well within his rights.

Ideal Cash Register Co. v. Zunino, 39  
Misc. 313.

Windmuller v. Pope, 107 N. Y. 674.

### 375.

Judgment for A. Title had not passed to him. The cigars he ordered had not been shipped, and those shipped were not on the credit stated in the order; neither had A accepted, for the cigars were destroyed before they reached him. There was no contract, express or implied, between the parties.

Bruce v. Pearson, 3 Johns. 534.

Corning v. Colt, 5 Wend. 253, 256.

Downer v. Thompson, 2 Hill, 137; Id.,  
6 Hill, 208.

### 376.

The exception was not well taken. The presumption of innocence has no application to civil cases but to criminal cases only.

Kurz v. Doerr, 86 App. Div. 507; affd.,  
180 N. Y. 88.

### 377.

Objection should be overruled. Notwithstanding the statement in the note that it was given for money loaned, it is open to either party to show the true consideration thereof.

Miller v. McKenzie, 95 N. Y. 575, 578.  
Wheeler v. Billings, 38 N. Y. 263, 264.  
Arnot v. The Erie Railway Co., 67 N. Y.  
321.

### 378.

Objection should be sustained. The declarations of the decedent were merely a narrative of a past transaction and not admissible as a part of the *res gestæ*. The *res gestæ* was the accident of which the declarations were no part, not being made at the same time or place, nor were they so

nearly contemporaneous with it as to characterize the accident or throw any light upon it.

Waldele v. Railroad, 95 N. Y. 274.

People v. Driscoll, 107 N. Y. 414, 424.

Martin v. Railroad, 103 N. Y. 626.

People v. Smith, 172 N. Y. 242.

Austin v. Bartlett, 178 N. Y. 310, 313.

**379.**

The exception was valid. The widow was a person interested in the event of the action for if the deed was canceled, her right of dower in the property transferred by her consent would in effect be restored.

Sanford v. Ellithorp, 95 N. Y. 48.

**380.**

Judgment should be for A. The note was barred by the statute of limitations. To make an indorsement upon a promissory note by the holder, of part payment, without the privity of the maker, competent evidence to meet the statute of limitations it must appear that it was made at a time when its operation would be against the interest of the party making it.

Mills v. Davis, 113 N. Y. 243.

Roseboom v. Billington, 17 Johns. 181, 182.

Read v. Hurd, 7 Wend. 408.

**381.**

Motion was denied. The defendant's rights were not jeopardized, nor was he in any way prejudiced. The adjournment was simply a suspension of the proceedings to be continued, and the court still retained jurisdiction for that purpose.

People v. Sullivan, 115 N. Y. 185.

**382.**

It was sufficient. Section 29 of the Penal Code provides that a person who counsels, induces or procures another to commit a crime is a principal and hence the indictment was sufficient. Although the offense was committed by the de-

fendant through the agency of another still it was the act of the defendant.

People v. Bliven, 112 N. Y. 79.  
 People v. Mills, 178 N. Y. 274, 288.  
 People v. Peckens, 153 N. Y. 576.

### 383.

Yes. The identity of the dead body found, with that of B, was not included in the *corpus delicti* and was left open to indirect or circumstantial evidence.

People v. Palmer, 109 N. Y. 110.

### 384.

Motion denied. The doctrine *res ipsa loquitur* applies.

"While in an action against a railroad corporation the burden of showing negligence on its part, occasioning an injury, rests in the first instance, upon the plaintiff, proof that the injury was the result of an accident which would not ordinarily have happened had the track and machinery been in proper condition, and the latter operated with proper care, is sufficient, and the onus then rests upon the defendant to prove that the injury was caused without its fault."

Seybolt v. The N. Y., L. E. & W. R. R. Co., 95 N. Y. 562.  
 Cosulich v. S. O. Co., 122 N. Y. 127, 128.  
 Klinger v. United Traction Co., 92 App. Div. 104.

### 385.

Judgment for A. The words were not spoken of C in reference to his occupation as a physician; they were not actionable *per se* and no special damages were proven.

Cassavoy v. Pattison, 93 App. Div. 370, 372.

Moore v. Francis, 121 N. Y. 199.  
 Moore v. M. N. Bank, 123 N. Y. 420.  
 Bornman v. Star Co., 174 N. Y. 219.  
 Triggs v. Sun P. & P. Assn., 179 N. Y. 144.

386.

No.

"The owner of a city lot may improve and fill it up, or may, if he desires to build, construct walls so as to protect his lot against the surface water from an adjoining higher lot."

Vanderwiele v. Taylor, 65 N. Y. 341.  
Yynch v. Mayor, 76 N. Y. 60.  
Barkley v. Wilcox, 86 N. Y. 144.  
Davis v. Niagara F. T. Co., 171 N. Y. 336.

387.

B, C and D, the adopted child, take equally.

A, the foster parent, and D, the adopted child, sustain towards each other the legal relation of parent and child, and have all the rights and are subject to all the duties of that relation, including the right of inheritance from each other.

Domestic Relations Law (Laws 1898, chap. 272), sec. 64.

Van Beck v. Thomsen, 44 App. Div. 373; affd., 167 N. Y. 601.

Dodin v. Dodin, 40 N. Y. Supp. 748.

388.

C, the residuary legatee, takes the house and lot, and the \$10,000 in cash.

Lapsed devises as well as lapsed legacies fall into the residue, and are disposed of under the general residuary clause of the will.

Cruickshank v. Home of the Friendless, 113 N. Y. 337.

Matter of Allen, 151 N. Y. 243.

Moffett v. Elmendorf, 152 N. Y. 484.

389.

The will is valid as to the personal property, for a male person of the age of eighteen years and upwards may give and bequeath his personal estate by will in writing.

2 R. S. 60, sec. 21, as amended by Laws 1867, chap. 82, sec. 4.

An infant cannot make a valid will devising his or her real estate.

2 R. S. 56, sec. 1, as amended by Laws 1867, chap. 82, sec. 3.

The will will be probated as a will of personal estate, and B will receive his \$20,000 of personal property thereunder. A dies intestate as to his real estate, and that will go to his two brothers B and C subject to the widow's dower.

Real Property Law (Laws 1896, chap. 547), secs. 170, 287.

390.

As between the husband and the wife equity will consider the mortgage as a valid and subsisting lien on the farm, and as never having been paid. She can bring an action to have the satisfaction set aside and its record canceled and for its foreclosure.

The equitable principle involved is that "equity regards as done that which ought to be done."

Alden v. Barnard, 15 Misc. 512.

Vide 16 Cyc. 135.

Am. & Eng. Encyc. Law, Vol. 11 (2d ed.), p. 180.

391.

The \$10,000 shall be distributed as real estate; the child of the deceased son taking the \$10,000 as such, as the heir-at-law of his father subject to the widow's dower therein.

"Equity regards that as done which ought to be done." Under the doctrine of equitable conversion, in order to carry out the intention of the testator, equity will regard the money which he directed to be invested in a farm as real estate and will dispose of it as such.

Thorn v. Coles, 3 Edw. Ch. 330.

Lorillard v. Coster, 5 Paige Ch. 172.

Hawley v. James, 5 Paige Ch. 318.

Bolton v. De Peyster, 25 Barb. 539.

Am. & Eng. Encyc. Law (2d ed.), Vol. 7, p. 465.

"Money directed by will to be employed in the purchase of land is to be considered as land."

9 Cyc. 840.

As to the distribution, *Vide Real Property Law* (Laws 1896, chap. 547), secs. 170, 281.

392.

Judgment for D. A had the absolute right when he paid the amount of the mortgage to B to take back, instead of a satisfaction, an assignment in blank, and to subsequently reissue it and to insert in the assignment the name of the new holder. C has no complaint coming; he purchased the farm subject to the mortgage which he assumed and agreed to pay, and to that extent did not pay cash. Hence he is not harmed and is estopped from claiming payment and satisfaction of the mortgage.

Kellog v. Ames, 41 N. Y. 259.

Wallach v. Schulze, 22 App. Div. 60.

Bogert v. Bliss, 148 N. Y. 195, at 200, 201.

393.

The claim of the old board to hold over is invalid.

The "B" ticket is elected as certified, it having received a plurality of the votes cast; a majority vote is not required.

"The directors of every stock corporation shall be chosen at the time and place fixed by the laws of the corporation by a plurality of the votes at such election."

Stock Corporation Law (Laws 1890, chap. 564, as amended, L. 1892, chap. 688, and L. 1901, chap. 354), sec. 20.

394.

Yes. A has a valid claim for the value of his services. The services were rendered to the stock company by A as an attorney on its retainer, and were outside of his official duties. He is entitled to be paid.

Bagley v. Carthage, W. & S. H. R. R. Co., 165 N. Y. 179.

395.

The note is good under the circumstances disclosed.

(a) It was ordered executed and issued for corporate purposes at a regular meeting of the corporation. A majority of the directors were present who constituted a quorum for the transaction of business, and a majority of the quorum present voted in favor of the proposition.

General Corporation Law (Laws 1890,  
chap. 563, as amended Laws 1892,  
chap. 687), sec. 29.

(b) The paper signed by the dissenting directors and the two absent directors had no force; they, although a majority of the board, have no separate or individual authority to bind the corporation,—it is only when acting as a board can they make or authorize acts binding on the corporation.

People's Bank v. St. Anthony's R. C.  
Church, 109 N. Y. 512.

Columbia Bank v. G. T. Church, 127  
N. Y. 361.

396.

None. Although legitimatized by the marriage of its parents and entitled to all the rights and privileges of a legitimate child, an estate or interest vested or trust created before the marriage is not divested or affected by reason of the child being legitimatized.

Domestic Relations Law (Laws 1896,  
chap. 272), sec. 18.

397.

The appointment is invalid. The husband cannot appoint a guardian of the person of his infant child to the exclusion of the surviving wife. The wife is a joint guardian of her children with her husband with equal powers, rights and duties in regard to them. The wife's fitness to act as guardian is not involved in the question.

Domestic Relations Law (Chap. 272,  
Laws 1896), sec. 51.

398.

Judgment for defendant.

A sued the infant "in contract," and as he sought to enforce the contract, and not to recover damages resulting from the fraud, he is not entitled to recover.

Fraudulent representations made by an infant to induce another to enter into a contract with him will not give it validity.

Studwell v. Shaffer, 54 N. Y. 249.

N. Y. Building Loan Co. v. Fisher, 23 App. Div. 363.

399.

"Every male citizen of the age of twenty-one years, who shall have been a citizen for ninety days, and an inhabitant of this state one year next preceding an election, and for the last four months a resident of the county, and for the last thirty days a resident of the election district in which he may offer his vote, shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people \* \* \* \*."

N. Y. Const., art. II, sec. 1.

400.

The court should deny the motion.

"No person shall be subject to be twice put in jeopardy for the same offense."

N. Y. Constitution, art. I, sec. 6.

People v. Comstock, 8 Wend. 549.

Code of Criminal Procedure, sec. 9.

A new trial can only be granted in criminal actions for misconduct of the jury when a verdict has been rendered against the defendant.

Code of Criminal Procedure, secs. 463,  
465.



# **THE STATUTES AND RULES REGULATING ADMISSION TO THE BAR IN THE STATE OF NEW YORK.**

## **S T A T U T E S .**

### **CODE OF CIVIL PROCEDURE.**

**(Chapter 1, Title 2, Article Second.)**

**§ 56. [Am'd, 1895.] Examination and admission of attorneys.**

A citizen of the State, of full age, applying to be admitted to practice as an attorney or counselor in the courts of record of the State, must be examined and licensed to practice as herein prescribed. A State board of law examiners is hereby created, to consist of three members of the bar, of at least ten years' standing, who shall be appointed from time to time, by the court of appeals, and shall hold office as a member of such board for a term of three years, except under the first appointment which shall be for terms of one, two and three years respectively, until the appointment of his successor. Such court shall prescribe rules providing for a uniform system of examination which shall govern such board of law examiners in the performance of its duties and shall fix the compensation of its members. There shall be examinations of all persons applying for admission to practice as attorneys and counselors-at-law at least twice in each year in each judicial department and at such other times and places as the court of appeals may direct. Every person applying for such examination shall pay such fee, not to exceed fifteen dollars, as may be fixed by the court of appeals as necessary to cover the cost of such examination. On payment of one examination fee the applicant shall be entitled to the privilege of not exceeding three examinations. Such board shall certify to the appellate division of the supreme court of the department in which each candidate has resided for the past six months every person who shall pass the examination, provided such

person shall have in other respects complied with the rules regulating admission to practice as attorneys and counselors, which fact shall be determined by said board before examination. Upon such certificate, if the appellate division of the supreme court shall find such person is of good moral character, it shall enter an order licensing and admitting him to practice as an attorney and counselor in all courts of the State. Race or sex shall constitute no cause for refusing any person examination or admission to practice. Any fraudulent act or representation by an applicant in connection with his application or admission shall be sufficient cause for the revocation of his license by the appellate division of the supreme court granting the same. Such board shall render during the month of January, an annual account of all their receipts and disbursements to the court of appeals. The court of appeals may make such provisions as it shall deem proper for admission of persons who have been admitted to practice in other States or countries.

L. 1895, ch. 946.

**§ 57. [Am'd, 1895.] Rules, how changed.**

The rules established by the court of appeals, touching the admission of attorneys and counselors to practice in the courts of record of the State, shall not be changed or amended, except by a majority of the judges of that court. A copy of each amendment to such rules must, within five days after it is adopted, be filed in the office of the secretary of State; who must transmit a printed copy thereof to the clerk of each county, and to the presiding justice of the appellate division of the supreme court, in each judicial department, and also cause the same to be published in the next ensuing volume of the session laws.

L. 1895, ch. 946.

**§ 58. [Am'd, 1893.] Exemptions to graduates of certain law schools.**

Nothing contained in the last two sections prevents the court of appeals from dispensing, in the rules established by it, with the whole or any part of the stated period of clerkship, required from an applicant, or with an examina-

tion, where the applicant is a graduate of the Albany law school, the law department of Union university, or of the law department of the university of the city of New York, or of the law school of Columbia College, or of the law department of Hamilton College, or of the law school of the University of Buffalo, and the New York law school, and produces his diploma upon his application for admission.

L. 1893, ch. 163.

**§ 59. [Am'd, 1895.] Attorney's oath of office, and certificate of admission.**

Each person, admitted as prescribed in the last three sections, must, upon his admission, take the constitutional oath of office in open court, and subscribe the same in a roll or book, to be kept in the office of the clerk of the appellate division of the supreme court for that purpose. The clerk, upon the payment of the fees allowed by law, must deliver to the person admitted, a certificate under his hand and official seal, stating that such person has been so admitted, and that he has taken and subscribed the constitutional oath of office as prescribed in this section.

L. 1895, ch. 946.

**§ 60. Attorneys residing in adjoining states.**

A person, regularly admitted to practice as attorney and counsellor, in the courts of record of the State, whose office for the transaction of law business is within the State, may practice as such attorney or counsellor, although he resides in an adjoining State. But service of a paper, which might be made upon him at his residence, if he was a resident of the State, may be made upon him, by depositing the paper in a post office in the city or town where his office is located, properly inclosed in a post-paid wrapper, directed to him at his office. A service thus made is equivalent to personal service upon him.

L. 1866, ch. 175, § 1 (6 Edm. 706).

**§ 61. Clerks, etc., not to practice.**

The clerk, deputy-clerk, or special deputy-clerk of a court shall not, during his continuance in office, practice as attorney or counsellor in that court.

I R. S. 109, § 26, am'd.

**§ 62. Sheriffs, etc., not to practice.**

A sheriff, under sheriff, deputy-sheriff, sheriff's clerk, constable, coroner, crier, or attendant of a court, shall not, during his continuance in office, practice as an attorney or counsellor in any court.

*Id.*, § 27, extended.

**§ 63. [Am'd, 1879, 1898.] None but attorneys to practice in New York city.**

A person shall not ask or receive, directly or indirectly, compensation for appearing as attorney in a court or before any magistrate in the city of New York, or make it a business to practice as an attorney in a court or before a magistrate in said city, unless he has been regularly admitted to practice, as an attorney or counsellor, in the courts of record of the State.

L. 1862, ch. 484, § 1; and *id.*, ch. 53, § 1; L. 1898, ch. 316. In effect June 1, 1898.

**§ 64. [Am'd, 1898.] Penalty for violation, or suffering violation of last section.**

A person who violates the last section is guilty of a misdemeanor, and shall be punished by imprisonment in the county jail, not exceeding one month, or by a fine of not less than one hundred dollars or more than two hundred and fifty dollars, or by both such fine and imprisonment. A judge, justice or magistrate within the city of New York who knowingly permits to practice in his court, a person who has not been regularly admitted to practice in the courts of record of this State, is guilty of a misdemeanor, and shall be punished as prescribed in this section. But this and the last section do not apply to a case where a person appears in a cause to which he is a party.

*Id.*; and § 2 of ch. 484; L. 1898, ch. 316. In effect June 1, 1898.

**§ 193. Court (of Appeals) may make rules.**

The court may from time to time make, alter, and amend, rules, not inconsistent with the constitution or statutes of the State, regulating the practice and proceedings in the court, and the admission of attorneys and counsellors at law, to practice in all the courts of record of the State.

L. 1870, ch. 203, § 2; and L. 1871, ch. 486, § 1.

## REGISTRATION LAW.

**AN ACT** for the registration of all persons duly admitted and licensed to practice as attorneys at law or as attorneys and counsellors at law in the courts of record of this State. (Chapter 165, Laws 1898, as amended by chap. 225 of the Laws of 1899, and by chap. 588, Laws 1900.)

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Every person duly licensed and admitted to practice as an attorney at law or as an attorney and counsellor at law in the courts of record of this State must, before the first day of July, 1899, subscribe and take an oath or affirmation which must be substantially in the following form; the blanks being properly filled:

STATE OF NEW YORK. }  
..... County, } ss.:

I, ....., being duly sworn (or affirmed), do depose and say that I am a natural born citizen of the United States (if naturalized, state when and where) and now reside at ..... (or, if a resident of an adjoining State and admitted to practice in the courts of record of this State, and whose office for the transaction of law business is within this State, state the fact). That I was duly and regularly licensed and admitted to practice as an attorney at law, or as an attorney and counsellor at law in the courts of record of this State at the ..... term, 18.., of the general term (or Appellate Division) of the Supreme Court (or other court as the case may be) held at ....., and that I took the constitutional oath of office.

Subscribed and sworn to before me, this  
..... day of 189... }

Which oath or affirmation shall be filed in the office of the Clerk of the Court of Appeals by the person making the same, provided, nevertheless, that such affidavit or affirmation may state that the deponent or affirmant believes that he took the constitutional oath of office in lieu of stating un-

qualifiedly that he did so, where the affidavit or affirmation states, or in substance shows, the deponent's or affirmant's lack of positive or certain recollection of having taken such oath, or shows other substantial reasons for thus qualifying the affidavit or affirmation on that subject. And provided further, in respect of persons who were solicitors in chancery or attorneys of, or in the Supreme Court on the first Monday of July, 1847, and who therefore became entitled to the benefit of the provisions of section seventy-five, of chapter two hundred and eighty of the Laws of eighteen hundred and forty-seven, commonly called the judiciary act, entitling them to practice as attorneys, solicitors, and counsellors in all the courts of this State, that the affidavit or affirmation required from such persons by this section in lieu of stating their license and admission prior to July first, eighteen hundred and forty-seven, to have been as attorney at law or as attorney and counsellor-at-law in the courts of record of this State may state such admission and license to have been as attorney of, or in the Supreme Court, or as solicitor in chancery or solicitor of the Court of Chancery according to the fact. And said affidavit or affirmation may state correctly the court and term of court in, or at which the admission prior to July first, eighteen hundred and forty-seven, took place. After July first, eighteen hundred and ninety-nine, the special term of the Supreme Court of the judicial district where such attorney at law or attorney or counsellor at law resides, may, upon proof by affidavit showing reasonable grounds therefor, grant an order permitting the applicant to make and file the oath or affirmation required herein, with the same effect as if the same had been made and filed within the time above stated, and relieving him from penalties and prosecutions by reason of failure to make and file such oath or affirmation within the time required. (As amended by chap. 225, Laws 1899.)

§ 2. Every person who is hereafter duly licensed and admitted to practice as an attorney and counsellor at law in the courts of record of this State, by an Appellate Division of the Supreme Court, shall subscribe and take and file the aforesaid oath or affirmation as provided in the first section of

this act, before he begins or is entitled to begin to practice for another as an attorney and counsellor at law in the courts of record of this State, or in any court in the county of New York or in the county of Kings. A person who practices any fraud or deceit or knowingly makes any false statement in the oath or affirmation in and by this act required to be made and filed is guilty of felony.

§ 3. It shall be the duty of the Clerk of the Court of Appeals to file in his office the said oaths or affirmations, aforesaid, and to compile the statements contained therein, and to enter therefrom in a bound book or volume to be kept by him for that purpose which shall be known and designated as, and is hereby made the "Official register of attorneys and counsellors at law in the State of New York," in the alphabetical order of the first letter of their surnames, the names and residences and the title of the court, and the time and place where admitted, and the date the oath or affirmation aforesaid was filed, of all persons who have filed in his said office the oath or affirmation as aforesaid, which said "official register of attorneys and counsellors at law in the State of New York," is hereby declared to be a public record and presumptive evidence that the individuals therein named are duly registered to practice as attorneys and counsellors at law in the courts of record of this State, or in any court in the counties of New York and Kings.

§ 4. On and after July first, eighteen hundred and ninety-nine, it shall be unlawful for any person to practice or appear as an attorney at law or as attorney and counsellor at law for another in a court of record in this State, or in any court in the county of New York, or in the county of Kings, or to make it a business to practice as an attorney at law or as an attorney and counsellor at law for another in any of said courts, or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner or to assume to be an attorney or counsellor at law, or to assume, use, or advertise the title of lawyer or attorney and counsellor at law, or attorney at law, or counsellor at law, or attorney or counsellor, or attorney and counsellor, or equivalent terms in any language in such manner as to convey the impression that he is a legal practitioner of law, or

in any manner to advertise that he either alone or together with any other persons or person, has, owns, conducts or maintains a law office, or law and collection office, or office of any kind for the practice of law, without having first been duly and regularly licensed and admitted to practice law in the courts of record of this State, or, in case of persons licensed and admitted prior to July first, eighteen hundred and forty-seven, without having first been duly and regularly licensed and admitted to practice as attorney of, or in the then Supreme Court or as solicitor in chancery or of the Court of Chancery, and without having taken the constitutional oath and without having subscribed and taken the oath or affirmation required by the first section of this act, and filed the same in the office of the Clerk of the Court of Appeals as required by said first section of this act. Any person violating the provisions of this section is guilty of a misdemeanor and it shall be the duty of the district attorneys to enforce the provisions of this act and to prosecute all violations thereof.

§ 5. Every person filing with the Clerk of the Court of Appeals the oath or affirmation hereinbefore provided shall pay to the said clerk at the time of such filing the sum of twenty-five cents to defray the necessary disbursements incurred by him in carrying out the provisions of this act. It shall be the duty of the said clerk of the Court of Appeals, on or before the first day of November, eighteen hundred and ninety-nine, to cause the said "official register of attorneys and counsellors at law in the State of New York," to be printed, and to file a certified copy thereof in the office of the county clerk of each county within the State, and with the clerk of each of the appellate divisions, and annually thereafter to print and file as aforesaid, all additions to the said official register made during the preceding twelve months, the expense thereof to be paid out of the fees collected by him pursuant to the provisions of this act, after defraying the necessary disbursements incurred by him under section three thereof. (As amended by chap. 558, Laws 1900.)

§ 6. This act shall take effect on the first day of September, eighteen hundred and ninety-eight.

## RULES

In Relation to the Admission of Attorneys and Counselors-at-Law.

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### RULES OF THE COURT OF APPEALS,

Adopted by the judges of the Court of Appeals on December 2, 1895, to take effect on January 1, 1896, as amended to date.

#### RULE I.

No person shall be admitted to practice as an attorney or counselor in any court of record in this State, without a regular admission to the bar and license to practice granted by an Appellate Division of the Supreme Court.

#### RULE II.

Any person who has been admitted to practice, and has practiced three years as an attorney and counselor in the highest court of law in another State, and any person who has thus practiced in another country, or who, being an American citizen and domiciled in a foreign country, has received such diploma or degree therein, as would have entitled him if a citizen of such foreign country to practice law in its courts, may, in the discretion of an Appellate Division of the Supreme Court, be admitted and licensed without an examination. But he must possess the other qualifications required by these rules, and must produce a letter of recommendation from one of the judges of the highest court of law of such other State, or country, or furnish other satisfactory evidence of character and qualifications.

A persons who resides in an adjoining State upon compliance with this rule, may, without change of residence, be admitted to practice on sufficient proof that he intends forthwith to open and permanently to maintain an office for the transaction of law business in this State. (Amended June 24, 1903.)

**RULE III.**

All other persons may be admitted and licensed upon producing and filing with the court the certificate of the State Board of Law Examiners that the applicant has satisfactorily passed the examination prescribed by these rules, and has complied with their provisions; and upon producing and filing with the court evidence that such applicant is a person of good moral character, which may be shown by the certificate of the attorney with whom he has passed his clerkship, or by some attorney in the town or city where he resides, but such certificate shall not be conclusive, and the court may make further examination and inquiry.

**RULE IV.**

To entitle an applicant to an examination as an attorney and counselor, he must prove by his own affidavit, to the satisfaction of the State Board of Law Examiners:

First. That he is a citizen of the United States, twenty-one years of age, stating his age, and a resident of the State, and that he has not been examined for admission to practice and been refused admission and license within three months immediately preceding.

Second. That he has studied law in the manner and according to the conditions hereinafter prescribed for a period of three years, and that he is the same person mentioned in his annexed preliminary papers, except that if the applicant be a graduate of any college or university, his period of study may be two years instead of three, and except also that persons who have been admitted as attorneys in the highest court of original jurisdiction of another State or country, and have remained therein as practicing attorneys for at least one year, may be admitted to such examination after a period of law-study of one year within this State.

**RULE V.**

Applicants for examination shall be deemed to have studied law within the meaning of these rules only when they have complied with the following terms and conditions, viz.:

1. The provisions for requisite periods of study must be fulfilled by serving a regular clerkship in the office of a practicing attorney of the Supreme Court in this State after the age of eighteen years; or after such age, by attending an incorporated law school, or a law school connected with an incorporated college or university having a law department organized, with competent instructors and professors, in which instruction is regularly given; or after such age, by pursuing such course of study, in part by attendance at such law school, and in part by serving such clerkship.

2. If the applicant be a graduate of a college or university, he must have pursued the prescribed course of study after his graduation; and if he be a person admitted to the bar of another State or country, he must have pursued his prescribed period of study after having remained an attorney in such other State or country for the period of one year.

3. Applicants who are not graduates of a college or university, or members of the bar as above described shall, before entering upon the clerkship or attendance at a law school herein prescribed, or within one year thereafter, have passed an examination conducted under the authority and in accordance with the ordinances and rules of the University of the State of New York in English composition, advanced English, first year Latin, arithmetic, algebra, geometry, United States and English history, civics and economics, or in their substantial equivalents as defined by the rules of the University, and shall have filed a certificate of such fact, signed by the secretary of the University with the clerk of the Court of Appeals, whose duty it shall be to return to the person named therein a certified copy of the same showing the date of such filing. The Regents may accept as the equivalent of and substitute for the examination in this rule prescribed either, first, a certificate properly authenticated of having successfully completed a full year's course of study in any college or university; second, a certificate properly authenticated, of having satisfactorily completed a three years' course of study in any institution registered by the Regents as maintaining a satisfactory academic standard; or, third, a Regents' diploma. The Regents' certificate above prescribed

shall be deemed to take effect as of the date of the completion of the Regents' examination, as the same shall appear upon said certificate.

Attendance at a law school during a school year of not less than eight months in any year shall be deemed a year's attendance under this rule; and in computing the period of clerkship a vacation actually taken, not exceeding two months in each year, shall be allowed as part of such year.

It shall be the duty of attorneys with whom a clerkship shall be commenced to file a certificate of the same in the office of the clerk of the Court of Appeals, which certificate shall in each case state the date of the beginning of the period of clerkship, and such period shall be deemed to commence at the time of such filing, and shall be computed by the calendar year. The same period of time shall not be duplicated for different purposes, except that a student attending a law school as herein provided, and who, during the vacations of such school, not exceeding three months in any one year, shall pursue his studies in the office of a practicing attorney, shall be allowed to count the time so occupied during such vacation or vacations as part of the clerkship in a law office specified in these rules.

#### RULE VI.

The State Board of Law Examiners, before admitting an applicant to an examination, shall require proof that the preliminary conditions prescribed by these rules have been fulfilled, which proof shall be made as follows, viz.:

1. That the applicant is a college graduate, by the production of his diploma or certificate of graduation under the seal of the college.
2. That he has been admitted to the bar of another State or country, by the production of his license or certificate executed by the proper authorities.
3. That he has served a regular clerkship in the office of a practicing attorney of the Supreme Court in this State, after the age of eighteen years, by producing and filing with the Board a certified copy of the attorney's certificate as filed in the office of the clerk of the Court of Appeals, and producing and filing an affidavit of the attorney or attorneys with whom

such clerkship was served, showing the actual service of such a clerkship, the continuance and end thereof, and that not more than two months' vacation was taken in any one year.

4. The time of study allowed in a law school must be proved by the certificate of the teacher or president of the faculty under whose instructions the person has studied, under the seal of the school, if such there be, in addition to the affidavit of the applicant, which must also state the age at which the applicant began his attendance at such law school, which proof must be satisfactory to the Board of Examiners.

5. That the applicant has passed the Regents' examination or its equivalent, must be proved by the production of a certified copy of the Regents' certificate filed in the office of the clerk of the Court of Appeals, as hereinbefore provided.

6. When it satisfactorily appears that any diploma, affidavit or certificate required to be produced has been lost or destroyed without the fault of the applicant, or has been unjustly refused or withheld, or by the death or absence of the person or officer who should have made it, cannot be obtained, the Board of Law Examiners may accept such other proof of the requisite facts as they shall deem sufficient.

7. A law student whose clerkship or attendance at a law school has already begun as shown by the record of the Court of Appeals, or of any incorporated law school or law school established in connection with any college or university, may at his option file or produce instead of the proofs required by these rules, those required by the rules of the Court of Appeals adopted October 28, 1892.

#### RULE VII.

When the filing of a certificate as required by these rules has been omitted by excusable mistake, or without fault, the court may order such filing as of the proper date. All certificates heretofore issued to law students by the Board of Regents and founded upon equivalents instead of an actual examination, are validated and made effectual, and may be accepted as sufficient by the Board of Law Examiners.

**RULE VIII.**

The State Board of Law Examiners shall be paid as compensation, each the sum of \$2,000 per year, and, in addition, such further sum as the court may direct, and an annual sum not exceeding \$2,000 per year shall be allowed for necessary disbursements of the Board. Every applicant for examination shall pay to the examiners a fee of ten dollars, which shall be applied upon the compensation and allowance above provided, and any surplus thereafter remaining shall be held by the treasurer of the State Board of Law Examiners and deposited in some bank in good standing in the city of Albany to his credit and subject to his draft as such treasurer when approved by the chief judge. The examinations held by such State Board of Examiners may be conducted by oral or written questions and answers, or partly oral and partly written, but shall be as nearly uniform in the knowledge and capacity which they shall require, as is reasonably possible. An applicant who has failed to pass one examination cannot again be examined until at least three months after such failure.

**RULE IX.**

The State Board of Law Examiners shall hold at least one examination in each judicial department, at the city or village in which the Appellate Divisions of the Supreme Court are held, between the 10th day of June and the 20th day of July in each year, and one examination in each department at the places above named, during the month of January in each year. They may appoint other times and places for additional examinations, and may hold some or all of such additional examinations concurrently with the regular or annual examinations of any law school in this State, and any applicant entitled to be examined may be so examined, in any department, whether a resident therein or not.

These rules shall take effect on January 1, 1896.

**RULE X.**

(Adopted December 13, 1898.)

In all cases where, after the applicant shall have commenced his period of law study as provided by these rules,

he has engaged in the military or naval service of the United States of America, in its late war with Spain, the time of such service shall be included as a part of the period of study required by Rule IV.

The proof of compliance with preliminary requirements under Rule VI, with respect to such service, shall be made to the satisfaction of the Board of Law Examiners.

**SUPREME COURT RULE.**

**General Rules of Practice.**

**RULE I.**

**Applicants for admission as attorneys.**—Applicants for admission as attorneys and counselors who have passed the examination prescribed by the rules of the Court of Appeals shall file the certificates of the examiners with evidence of character with the clerk of the Appellate Division of the proper department at such times as shall be directed by special order, or by rules of the court in such department.

(For special rule in Second Department, *vide p. 12.*)

**RULES OF STATE BOARD OF LAW EXAMINERS.**

**RULE I.**

Each applicant for examination must file with the Secretary of the Board at least fifteen days before the day appointed for holding the examination at which he intends to apply, the preliminary proofs required by the "Rules for the admission of attorneys and counselors-at-law," as amended and adopted by the judges of the Court of Appeals, December 2, 1895, to take effect January 1, 1896, from which it must appear affirmatively and specifically that all the preliminary conditions prescribed by said rules have been fulfilled, and also proof of the residence of the applicant for six months prior to the date of the said examination, giving place, with street and number, if any, which must be made by his own affidavit. Said affidavit must also state that such residence is actual and not constructive. The Board in its discretion may order additional proofs of residence to be filed, and may require an applicant to appear in person before

it, or some member thereof, and be examined concerning his qualifications to be admitted to the examinations. The examination fee of \$10 must be paid to the Treasurer at the time the application for examination is filed.

*To entitle an applicant to a re-examination, he must notify the Secretary by mail of his desire therefor, at least fifteen days before the examination at which he intends to appear and file with him, at the same time, his own affidavit stating that he is and has been for the six months prior to such examination an actual and not constructive resident of this State, giving the place of such residence, and street and number, if any. (Approved November 22, 1904.)*

### RULE II.

Each applicant must be a citizen of the State, of full age; he may be examined in any department, whether a resident thereof or not, but the fact of his having passed the examination will be certified to the Appellate Division of the Judicial Department in which he has resided for the six months prior to his examination. He must, however, entitle his papers in the department in which he intends to apply for examination.

**NOTE.**—An applicant must appear for examination in the department in which he entitles his papers, unless permission of the Board otherwise be granted at least fifteen days before the day appointed for holding the examination.

### RULE III.

In applying the provisions of Rules IV and V of the Rules of the Court of Appeals, "For the admission of attorneys and counselors-at-law," the Board will require proof that the college or university of which an applicant claims to be a graduate, maintains a satisfactory standard in respect to the course of study completed by him. In case the college or university is registered with the Board of Regents of the State of New York as maintaining such standard, the applicant must submit to the Board, with his diploma or certificate of graduation, the certificate of the said Board of Regents to that effect, which will be accepted by this Board as *prima facie* evidence of the fact. In all other cases the applicant must submit with his diploma or certificate of graduation satisfactory proof of the course of study completed by him and of the character of the college or university of which he claims to be a graduate.

**RULE IV.**

The papers filed by each applicant must be attached together, and there must be indorsed upon them the name of the applicant. The papers must be entitled, "In the matter of the application of \_\_\_\_\_ for admission to the Bar." Each applicant must state the beginning and the end of each term spent in a law school, as well as the beginning and the end of each vacation that he has had.

**RULE V.**

An applicant who has been admitted as an attorney in the highest court of original jurisdiction of another State or country, and who has remained therein as a practicing attorney for at least one year, may prove the latter fact by his own affidavit, and must present also a certificate from a judge of the court in which he was admitted or from a county judge in said State, certifying that the applicant had remained in said State or country as a practicing attorney for said period of one year, after he had been admitted as an attorney therein. The signature of the judge must be certified to by the clerk of the court or by the county clerk under the seal of the court.

**RULE VI.**

An applicant whose clerkship or attendance at a law school was already begun, as shown by the records of the Court of Appeals, or of any incorporated law school or law school established in connection with any college or university, and who thereafter engaged in the military or naval service of the United States of America in its late war with Spain, may have the time of such service included as a part of the period of study required by the Rules of the Court of Appeals in relation to the admission of attorneys and counselors-at-law, on proof of the facts of such service; which shall be made by his own affidavit, showing the branch of the service, the place, and the date of his enlistment or commission, and the end, or probable time of the duration of his term of service, and by the production of his honorable discharge from such service, in case of his discharge, executed by the proper authorities — which discharge shall be returned when the application for examination is approved. (Approved December 19, 1898.)

NOTE.— Applicants should file their papers at the earliest possible moment; amendable defects may be discovered, which can be corrected if attended to promptly.



# FORMS.

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(Printed blank forms, the use of which is urgently recommended, can be procured from the librarians of any of the law schools in this State).

## CERTIFICATE OF COMMENCEMENT OF CLERKSHIP.

(To be filed in office of Clerk of Court of Appeals. A clerkship commences only from the day it is so filed. Fee \$1.00, for filing, and certified copy to be attached to application papers.)

I (or we) do hereby certify that I am (or we are) a practicing attorney(s) of the Supreme Court of this State, and maintain an office for the transaction of law business at ..... , and that ..... , who is eighteen years of age and upwards, has this day commenced the service of a regular clerkship in my (our) law office, aforesaid, pursuant to the rules of the Court of Appeals, for admission of attorneys and counselors-at-law.

Dated ....., 190..

(Signed)

.....

## AFFIDAVITS TO OBTAIN ORDER FILING CERTIFICATE OF COMMENCEMENT OF CLERKSHIP NUNC PRO TUNC.

NOTE.—The rules of the Court of Appeals (Rule V) make it the duty of attorneys with whom a clerkship shall be commenced to file a certificate of the same in the office of the Clerk of the Court of Appeals, which certificate shall, in each case, state the date of the beginning of the period of clerkship and such period shall be deemed to commence at the time of such filing, and shall be computed by the calendar year.

The rules further provide (Rule VII) that when the filing of a certificate as required by the rules has been omitted by excusable mistake or without fault, the court may order

such filing as of the proper date. A certificate of commencement of clerkship may be filed *nunc pro tunc*, upon the affidavit of the attorney showing that its filing had been omitted by excusable mistake or without fault, supplemented by the affidavit of the law clerk that he was duly qualified under the rules to begin the service of a clerkship at the date upon which it is sought to have the certificate so filed. The attorney prepares and signs a certificate of commencement of clerkship and dates it as of the day when the clerkship actually began, which certificate he procures to be filed *nunc pro tunc* as of that date. The motion is made *ex parte* by mailing the papers to the clerk.

#### ATTORNEY'S AFFIDAVIT.

IN COURT OF APPEALS, STATE OF NEW YORK.

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In the Matter of the Application	}
of	
..... for Admission to the Bar.	

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STATE OF NEW YORK, }  
CITY AND COUNTY OF ..... } ss.:

....., being duly sworn, deposes and says, that he is and was at and during all the times herein-after mentioned a practicing attorney of the Supreme Court of this State, maintaining a law office for the transaction of law business in the ..... of ..... in this State; that ....., the applicant above named, after the age of eighteen years commenced the service of a regular clerkship in deponent's law office aforesaid, beginning on the ..... day of ....., and that he actually and *bona fide* continued to serve his regular clerkship, as aforesaid, from that date until on or about the ..... day of .....

That deponent did not, at the time when said clerkship was commenced, as aforesaid, file or cause to be filed a

certificate of the commencement thereof in the office of the Clerk of the Court of Appeals as required by the rules of said court, for the following reasons: (*Here state some act or fact of inadvertence or excusable mistake why the certificate was not so filed.*)

Deponent asks that an order be entered filing the annexed certificate of commencement of said clerkship *nunc pro tunc* as of the ..... day of ....., 19..

Sworn to before me, this ....  
day of ....., 190..

#### AFFIDAVIT OF LAW CLERK.

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In the Matter of the Application	}
of	
.....	
for Admission to the Bar.	

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STATE OF NEW YORK, }  
CITY AND COUNTY OF ..... } *ss.?*

....., being duly sworn, deposes and says, that he is the applicant above named; that he is a citizen of the United States, and a resident of the State of New York and resides at ....., in this State.

That he is a graduate of a college (or, university), to wit, of ..... of .....; that he graduated therefrom on the ..... day of ....., 190.. with the degree of ..... (or)

Deponent further states that he has had a Law Students' Certificate No. ...., signed by the Secretary of the University of the State of New York, as required by the rules of the Court of Appeals, heretofore issued to him, and that the same was filed in the office of the Clerk of the Court of Appeals on the ..... day of .....

Deponent further states that after the age of eighteen years he began the service of a regular clerkship in the law

office of ....., a practicing attorney of the Supreme Court at ....., on the ..... day of ....., 190.., and that he continued the service of said clerkship from that date until on or about the ..... day of .....

That deponent did not file or cause to be filed at the time he commenced the service of his clerkship, as aforesaid, a certificate of the commencement thereof as required by the rules of the Court of Appeals.

Sworn to before me, this ....  
day of ....., 190..

**ORDER FILING CERTIFICATE OF COMMENCEMENT OF  
CLERKSHIP NUNC PRO TUNC.**

STATE OF NEW YORK, IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at the Capitol in the city of Albany, on the ..... day of ....., A. D. 19..

Present — Hon. ALTON B. PARKER, Chief Judge, presiding.

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In the Matter of the Application  
of  
.....  
for Admission to the Bar.

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On reading and filing the certificate and the affidavit of ....., an attorney and counselor-at-law, verified the ..... day of ....., 190.., showing the time of commencement with said ..... of a regular clerkship by the said .....; and the affidavit of ..... verified the ..... day of ....., 190.. On motion of ....., attorney for said applicant,

It is ordered that the certificate of the commencement

of clerkship of the said ....., be and the same is hereby filed *nunc pro tunc* as of the ..... day of ....., 19..

.....  
*Deputy Clerk.*

[L. S.]

**APPLICANT'S AFFIDAVIT.**

(To be filed with the Secretary of the State Board of Law Examiners, when applicant applies for examination).

**TITLE.**

IN THE APPELLATE DIVISION OF THE SUPREME COURT, FOR THE ..... JUDICIAL DEPARTMENT.

In the Matter of the Application  
of  
.....  
For Admission to the Bar.

**GENERAL CLAUSE.**

STATE OF NEW YORK, }  
COUNTY OF ....., } ss.:  
City of ....., }

....., being duly sworn, deposes and says:

That he is a citizen of the United States and a resident of the State of New York, and resides at No. ...., in the City of ...., County of ...., in the ..... Judicial Department; that he has resided in said Department, as aforesaid, for the six months past, and that such residence is and was during the said six months actual and not constructive.

That he is ..... years of age, and has not been examined for admission to practice and been refused admission and

license within the three months immediately preceding this application.

That he is the applicant herein named and the person mentioned in the annexed proofs that the preliminary conditions prescribed by the rules of the Court of Appeals for the admission of attorneys and counselors-at-law have been fulfilled, and that he has studied law in the manner and according to the conditions of said rules.

#### FOR COLLEGE GRADUATES.

Deponent further states that he is a graduate of a college (or university), to wit, of ..... of ..... That he graduated therefrom on the ..... day of ....., 190.., with the degree of ....., as will more fully appear by deponent's diploma therefrom, under the seal of said college (or university) herewith produced (or certificate of graduation under the seal of said college (or university) (hereto annexed), and marked Exhibit "...."

Deponent also annexes hereto, marked Exhibit ".....," proof that said ..... college (or university) is registered with the University of the State of New York as maintaining a satisfactory college standing in the course leading to the degree of ....., with which deponent graduated, as aforesaid.

#### LAW STUDENTS CERTIFICATE.

Deponent further states that he has passed an examination conducted under the authority and in accordance with the ordinances and rules of the University of the State of New York, and has had issued to him a Law Students Certificate, No. ...., signed by the Secretary of the University, as required by the rules of the Court of Appeals. That deponent completed his said Regents examinations as of the date appearing upon said certificate.

That on the ..... day of ....., 190.., deponent filed his Law Students Certificate, as aforesaid, in the office of the Clerk of the Court of Appeals. That hereto annexed is a certified copy of the same and proof of filing, as aforesaid, marked Exhibit "...."

**LAW STUDENTS CERTIFICATE ON EQUIVALENTS.**

Deponent further states that on the ..... day of ....., 190.., the University of the State of New York duly issued to deponent a Law Students Certificate, No. ...., signed by the Secretary of the University, as the equivalent of, and substitute for the Regents examinations prescribed by the rules of the Court of Appeals. That deponent completed the course of study on which said Law Student Certificate was issued on the date appearing upon said certificate. That on the ..... day of ....., he filed his said Law Students Certificate, as aforesaid, in the office of the Clerk of the Court of Appeals. That hereto annexed is a certified copy of the same and proof of filing, as aforesaid, marked Exhibit "....."

**CLERKSHIP.**

Deponent further states that on the ..... day of ....., 190.., he commenced the service of a regular clerkship in the law office of ....., a practicing attorney of the Supreme Court of the State of New York, at ..... in this State. That at that time he was over the age of eighteen years, and that said ..... on the ..... day of ....., 190.., filed or caused to be filed a certificate of the commencement of said clerkship in the office of the Clerk of the Court of Appeals. That a certified copy of said certificate of commencement of clerkship and proof of filing in the office of the Clerk of the Court of Appeals are hereto annexed and marked Exhibit "....."

That deponent served a regular clerkship in the law office of ....., a practicing attorney of the Supreme Court, at ..... in this State, after the age of eighteen years, commencing on the ..... day of ....., 190.., and ending on the ..... day of ....., 190..

That during the service of said clerkship deponent did not take more than two months vacation in any one year, the vacations taken by deponent began as follows, on the ..... day of ....., 190.., and ended on the ..... day of ...., 190.., and began on the ..... day of ....., 190.., and ended on the ..... day of ....., 190..

That hereto annexed is the affidavit of the attorney with

whom such clerkship was served, showing the actual service of such clerkship, the continuance and end thereof, and the beginning and end of each vacation taken by deponent during said clerkship.

**WHERE CERTIFICATE OF COMMENCEMENT OF CLERKSHIP IS  
FILED NUNC PRO TUNC.**

That on the ..... day of ....., the Court of Appeals duly granted an order filing deponent's certificate of commencement of clerkship, as aforesaid, in the office of the Clerk of the Court of Appeals, *nunc pro tunc* as of the .... day of ....., 190...; that hereto annexed is a certified copy of said order and proof of the entry thereof in the office of the Clerk of the Court of Appeals marked Exhibit "..."

**LAW SCHOOL ATTENDANCE.**

Deponent further alleges that he was in regular attendance upon the law lectures and exercises of the ..... Law School, situated at ..... during <sup>one</sup> <sub>two</sub> school <sub>three</sub> years of not less than eight months each, to wit, from the ..... day of ....., in the year 190.., to the ..... day of ....., in the year 190.., and from the ..... day of ....., 190.. to the ..... day of ....., 190.., and from the ..... day of ....., 190.. to the ..... day of ....., 190.. (Deponent further alleges that he has not entirely completed the school year last above-mentioned, but that he is still in attendance upon the sessions of said school and that it is *bona fide* his intention to complete the full time of attendance required for the said school year last above mentioned, on or before the date of the examinations as fixed by the State Board of Law Examiners, to wit, by the ..... day of ..... in the year last above mentioned.) Deponent further alleges that he was of the age of ..... years when he commenced his attendance upon the sessions of said school as above mentioned. The certificate of said law school given under its seal and signed by the ..... of the Faculty (or by the ..... of the

said school), as proof of such time of study and attendance upon said law school is hereto annexed and marked Exhibit "....."

**FOR ATTORNEY OF ANOTHER STATE.**

(Rule IV. Rules. Court of Appeals. Rule V. State Board of Law Examiners.)

Deponent further states that he was duly admitted as an attorney in the ..... Court of the State of ....., that being the highest court of original jurisdiction in said State, on the ..... day of ....., 190.., and that he remained therein as a practicing attorney for at least one year, viz., from the ..... day of ..... to the ..... day of ....., at ....., in said State, where he maintained an office for the transaction of law business in that State. That hereto annexed is deponent's license or certificate of admission to the bar of said State of ....., executed by the proper authorities, marked Exhibit "....," and a certificate from the Honorable ....., a Judge of the Court in which deponent was admitted to practice as aforesaid (or from a County Judge of said State), certifying that deponent had remained in said State of ..... at ..... aforesaid as a practicing attorney for said period of one year after he had been admitted as a practicing attorney therein.

That the signature of the said Judge is certified to by the Clerk of the Court (or by the County Clerk) under the seal of the Court, as appears by his certificate thereof hereto annexed marked Exhibit "..."

Sworn to before me, this ....  
day of ....., 190...

• •

• •

**ATTORNEY'S AFFIDAVIT.**

(To accompany applicant's proofs, when necessary.)

IN THE APPELLATE DIVISION OF THE SUPREME COURT, FOR THE ..... JUDICIAL DEPARTMENT.

In the Matter of the Application  
of  
.....  
For Admission to the Bar.

STATE OF NEW YORK, }  
COUNTY OF ..... } ss.:  
City of ....., }

....., being duly sworn, deposes and says:

That he is and was at and during all the times herein mentioned a practicing attorney of the Supreme Court of this State, maintaining a law office for the transaction of law business in the ..... of ..... in this State.

That ..... the applicant above-named, after the age of eighteen years, served a regular clerkship in deponent's law office, as aforesaid, beginning on the ..... day of ....., 190.., and ending on the ..... day of ....., 190..

That during the service of said clerkship not more than two months vacation was taken in any one year by the said ....., the beginning and end of each vacation taken by him being as follows, viz., from the ..... day of ..... in the year 190.. to the ..... day of ..... in the year 190..

Sworn to before me, this .....

day of ....., 19...

**CERTIFICATE OF GOOD MORAL CHARACTER.**

IN THE APPELLATE DIVISION OF THE SUPREME  
COURT FOR THE ..... JUDICIAL DEPART-  
MENT.

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In the Matter of the Application  
of

.....  
For Admission to the Bar.

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I do hereby certify that I am an attorney and counselor-at-law of the Supreme Court of the State of New York, and have known ....., the above-named applicant, for ..... years last past, and that he is to my knowledge a person of good moral character.

The facts upon which my knowledge, as aforesaid, is based are as follows: (*State in detail the facts and the acquaintance with the applicant which justifies the opinion expressed.*)

Dated, ....., 190..

(Signed.) .....

NOTE—In the Second Department the above certificate must be acknowledged; in the Fourth Department it must be verified or in the form of an affidavit.

## REGISTRATION OATH.

(To be Filed in the Office of the Clerk of the Court of Appeals After Admission and Before practicing. Fee, 25 cents. *Vide* p. 210.)

## IN COURT OF APPEALS — STATE OF NEW YORK.

In the Matter of the Registration  
of  
.....  
As an Attorney and Counselor-at-Law,

STATE OF NEW YORK,  
COUNTY OF ....., }  
City of ....., }

I, ....., being duly sworn, affirmed, (a) do depose and say:

That I am a natural born citizen of the United States, *naturalized citizen of the United States, having been duly naturalized at a Term of the ..... Court of ....., held at ....., in the City of ....., on or about the ..... day of ....., 18..*; that I now reside at No. .... Street, in the ..... of ....., New York, *in the State of ....., and have an office for the transaction of law business at No. ....., in the ..... of ....., within this State* (b).

That I was duly and regularly licensed and admitted to practice as an attorney and counselor-at-law, *an attorney-at-law*, in the Courts of Record of this State, at the ..... Term, 19.., of the General Term, *Appellate Division*, of the Supreme Court of this State, *or* (c).

.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....

held at the ~~27~~..... of ~~Nov.~~, in this State, and  
that I took the Constitutional oath of office (*d*).

Subscribed and sworn to, *affirmed* before me,  
this ..... day of ....., 189..

(a) Erase words in italics, if not necessary.

(b) Section 60, Code of Civil Procedure.

(c) "Or other Court, as the case may be." Persons who were so-  
licitors in chancery or attorneys of or in the Supreme Court on the  
first Monday of July, 1847, *Vide* sec. 1, chap. 165, Laws 1898, as  
amended by chap. 225, Laws 1899.

(d) Oath must be "substantially" in the above form, the blanks  
being properly filled (*id*).

As to the requirement as to stating that the affiant took the consti-  
tutional oath, *vide* sec. 1, same act.

*that I was duly and etc*



## COURSES OF STUDY FOR LAW CLERKS.

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[A paper read by FRANKLIN M. DANAHER before the Section of Legal Education of the American Bar Association, at Saratoga Springs, N. Y., August 29, 1902.]

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Because of the limited time and space allotted to us, we must be brief, and therefore will leave unsaid much that is relevant to our discourse on the general subject of legal education, its paramount importance to the public as well as to the profession, its history and development, its present needs and future requirements. The American Bar Association through its Section of Legal Education is doing good work in advancing the cause of higher education at the bar, and much of the marked improvement therein and the general raising of the standards for admission thereto are due to its intelligent propaganda. An examination of its reports, however, demonstrates that those who shape its policies, read its papers, and give direction to its debates, devote their time and talents almost, if not exclusively, to the establishment and improvement of law school methods, and pay but slight, if any, attention to the legal education of the law clerks who cannot, by reason of their environment, attend upon a law school. This omission is due to the fact that the majority of those who endeavor to raise the standing of the profession by educating its members are teachers in law schools, and because the average practitioner has neither the time nor the learning to devote to the subject. Whatever may be the cause, the important matter of the education of the law clerk in the science of the law appears to be totally neglected, and it will be our present endeavor, although an "average practitioner," to remedy that neglect, with the assistance of the aforesaid professors of the law.

We believe that those law clerks now studying to be

lawyers, whose circumstances prevent their attendance upon a law school, are thereby handicapped and are too numerous and will constitute too great a proportion of the bar of the future to be educationally neglected by those who are constantly evolving new methods of imparting legal knowledge to the students of the universities. The highest interests of the State, as well as the good of the profession, demand that some endeavor be made to aid them in their struggle, and because of it the New York State Board of Law Examiners, through the altruistic kindness of the law faculties of those great centers of legal education, Cornell, Yale, Pennsylvania and the New York Law School, is permitted to offer to the law clerks of the United States courses of law study based upon scientific method, which can be followed in the office, wherein are presented the subjects of study, the books to be read thereon, and the order of their reading, to the end that they may enter upon the practice of their profession on an equality with the law school graduates, with some knowledge of the scientific side of the law, and better fitted to take upon themselves its duties and responsibilities.

In offering these courses of study the Board must not be understood as in any way depreciating or underrating the necessity of a law school education. In a paper read by the writer before the New York State Bar Association, at its annual meeting held in the city of Albany in 1897 (Reports New York State Bar Association, vol. 20, p. 105), speaking of the necessity of law school training for applicants for admission to the bar, we said:

"Observation shows that under modern conditions existing in the profession, an education in law cannot be procured exclusively in a law office, and that those who have had the benefit of a law school training are better equipped to enter upon their careers and are more likely to succeed therein than those who come to the bar through an office. The reasons for this are many and obvious. The law clerk of to-day has not the advantages nor the opportunities of his predecessor of even twenty years ago. The methods of office work have been revolutionized in that time. The days when we, as clerks, laboriously made five, ten or fifteen

copies of a complaint in a foreclosure or partition, or copied and triplicated, by pen, orders and complaints and answers, at law and in equity, and unconsciously absorbed the form and substance of what we were doing and learned the language of the law, have given way to the days of the stenographer and typewriter. Law papers and briefs are now dictated by the attorney to the office stenographer, manifolded by machinery and sent out in many instances without the knowledge on the part of the clerk that any such were ever in existence. In many offices clerks follow specialties and learn nothing else, and, paradoxical as it may seem, the more business an office has the less are the educational opportunities of the clerk." \* \* \*

"How many lawyers, with students in their offices, know or care what the latter are reading or if they study at all? Their reading was not directed in their student days, and they see no reason why that of the present aspirants should be, forgetting entirely the differences in existing conditions at the bar and the vast number of better equipped competitors with his clerk, that the law schools are yearly turning out." \* \* \*

"The chances are equal, if the lawyer cared, that he would not know how to direct or construct a well considered and progressive course of law reading, covering a period of two years or more; so beyond telling him to commence on Blackstone, through many obsolete pages of which his clerk will unnecessarily wade, and then to read Kent, he lets him proceed at his own sweet will and pleasure to the destruction of all method, the waste of much valuable time, and the consequent loss of much needed knowledge." \* \* \*

"Members of the bar of the future to succeed must have a scientific, well directed and comprehensive training in a law school. The fact that many of the lawyers of to-day did not have that advantage and still succeeded is no reason why the future will not demand it. There is so much to be studied, and so much more that cannot be studied for want of time; there are so many books that must be read, and so many more that can be dispensed with; there are so many cases to be considered, rules to learn, and excep-

tions to know, that unless the law student puts himself under the guidance of some one learned in the art of directing law study, he will float at the mercy of every varying wind and tide, upon an ocean of knowledge, without rudder or compass and become unfit to make the voyage of life in his chosen profession."

Hon. William P. Goodelle, the President of our Board, in his remarks at the conference of State Boards of Bar Examiners, held in connection with the Section of Legal Education of the American Bar Association, at Saratoga Springs, N. Y., in 1898 (Reports American Bar Association, vol. 21, p. 533), speaking on the same subject, said:

"While many who have not had law school advantages succeed in passing our examinations, they find it exceedingly difficult. The law offices of this State, with typewriters and stenographers doing the work of students in earlier days, with little or no attention paid to them or to their course of study by those who should be their legal preceptors, furnish very inadequate advantages to the ordinary student, and he is an exceptionally good man who can go into a law office and so, unaided, fit himself to pass an examination.

"The student has learned that it is the thorough drill and systematic study of the law school that he needs and desires, to satisfactorily qualify himself in the law; and compelled by a somewhat seeming necessity, coupled with such desire, the tendency is toward the law schools; and the growing appreciation of a law school course will, in my judgment, result before many years in the Court of Appeals requiring by its rules that some portion, at least, of a legal course of study (in New York) shall be had in a law school."

The Board is convinced from its abundant experience, that law clerks are not as well equipped in the beginning of their practice and do not know as much law as the graduates of the schools. Its records show that out of every one hundred applying for examination for admission to the bar, who have not had the benefit of a carefully considered and scientific course in a law school, twenty-two fail, and but twelve fail who have had law school training, and the probabilities of future pro-

fessional success are about in the same proportion. It knows that a curriculum for law clerks is a crying need, from the many requests made for the same, and from the statements repeatedly made to its members by the law clerks, who spent their last year of study in attendance upon a law school, that that which struck them most forcibly and regretfully, after they had been there for a few months, was the valuable time they had lost during their clerkship in the study of the law, not from lack of time or of industry, but from want of method and of direction in how, and what, and when to read.

The Board recommends a person, who intends to become a lawyer, to first enter a law school and thereafter complete his legal education by serving a clerkship in a law office.

Unless the student has studied the law as a science, he cannot, even in a law office, without loss of valuable time, and much unnecessary labor, learn to apply it practically with benefit to himself and his client.

We believe that one who serves a law clerkship of a year after two years of attendance upon a law school, will learn more of practice and procedure and learn it better in that year than he would in three years clerkship without law school experience, and be a much better lawyer in addition.

The number of law books and their yearly increase is appalling, and is also a most important factor in the great problem of education in the law. Mr. Stephen D. Griswold, the law librarian of the New York Law Library, at Albany, writes to us, that in 1901 there were two hundred and thirty volumes of law reports published in English, containing about one hundred and sixty-one thousand pages, of which New York State alone contributed about nineteen thousand pages. That does not include text-books, encyclopedias, reprint series of reports, nor the law magazines. All those pages in a single year; every line a danger, every word a trap, even the punctuation a snare! Think of what has heretofore been published, and even though he shuts his eyes to the deluge which the future will bring forth, does the average law clerk imagine that he can, without the direction of a properly trained instructor in the law, know what to study, and what not to study, out of that vast mass of undigested matter?

It would be a waste of time for us to endeavor to establish the proposition that a law clerk cannot combine within himself nor find in his law office all the advantages of a university, and we will not make the attempt.

We will be content, if but a portion of the good accomplished by the preparation of this paper, consists in forcing into law schools those indifferent law clerks who can, but will not, either through ignorance or laziness, enter the same, to properly prepare themselves for their future professional life. Concerning such, we feel at times, quite in the frame of mind of Prof. James Barr Ames, of the faculty of the Law School of Harvard University, who wrote to us that it seemed to him undesirable to encourage men who cannot have the benefit of law school training, but propose to practice law, by providing a curriculum for them alone. We were convinced, however, that it was very essential that some educational aid should be given to those who must come to the bar through the office, and we appealed to the law faculties hereinbefore named, to provide courses of study for them, with the admirable results hereinafter presented.

The responses were prompt and generous. They show a kind and most commendable disposition and an earnest endeavor to aid those who are endeavoring under adverse conditions to fit themselves through office study alone for the law, and convince us that they have been overlooked rather than deemed unworthy of consideration, by the leaders in the present movement toward higher education at the bar. The courses of study submitted are not ideal, nor do they possess academic perfection; their authors intended that they should not, but for the purposes for which they were created, they are complete and comprehensive. They represent years of valuable work and experience in the art of teaching law, and are mines full of treasure for faithful and diligent law clerks. Each is up to date, properly balanced, and scientifically arranged by its authors, but it must be distinctly understood that neither is as good nor as efficient in results, as could be obtained by personal attendance upon the exercises and lectures of the schools.

# CORNELL UNIVERSITY.

ITHACA, N. Y.

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## PROPOSED OUTLINE OF STUDY FOR STUDENTS IN LAW OFFICES.

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Prepared by the Faculty of Cornell University College of Law.

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### A.

#### SUBSTANTIVE LAW.

The studies in Procedure should begin with the studies in Substantive Law and be continued throughout the whole period of study.

Wherever statutes are indicated, they are the New York statutes. Students in other States must seek assistance as to statutory references from practitioners or teachers in their States.

#### I. Elementary Law.

Woodruff's Introduction to the Study of Law.

Robinson's Elementary Law, with collateral readings in Blackstone (Chase's Ed.) and Kent.

#### II. Contract and Agency.

Anson on Contract (Huffcut's Ed.), with study of Huffcut and Woodruff's American Cases on Contract (2d Ed.); or Clark or Harriman (2d Ed.) on Contract.

Huffcut on Agency (2d Ed.), Book I, with Huffcut's Cases on Agency.

#### III. Torts (including Master and Servant).

Bigelow on Torts (7th Ed.), with Bigelow's Cases on Torts.

New York Code of Civil Procedure, §§ 1899-1908 and cases thereunder.

Huffcut on Agency (2d Ed.), Book II.

**IV. Domestic Relations and Law of Persons.**

Tiffany on Domestic Relations, with  
Woodruff's Cases on Domestic Relations and Law  
of Persons.

New York Domestic Relations Law.

New York Code Civil Procedure, §§ 1742-1774.

**V. Crimes and Criminal Procedure.**

Clark and Marshall on Criminal Law, with Beale's  
Cases on Criminal Law, or  
May on Criminal Law, with Chaplin's Cases on  
Criminal Law.

Beale's Criminal Pleading and Practice.

New York Penal Code and Code of Criminal Pro-  
cedure.

**VI. The Law of Property.**

**1. Real Property.**

Tiffany on Real Property, or Hopkins on  
Real Property, or Tiedeman on Real  
Property.

Finch's Cases on the Law of Property in  
Land.

Fowler's Real Property Law of New York.

**2. Personal Property, Including Sales.**

Brantly on Personal Property, with vol. I  
of Gray's Cases on Property, pp. 1-384.  
Fowler's Personal Property Law of New  
York.

Tiffany on Sales, or

F. M. Burdick on Sales, with F. M. Bur-  
dick's Cases on Sales.

Mechem on Sales (2 vols.), and Bennett's  
Ed. (1899) of Benjamin on Sales, are  
valuable for reference or study.

**VI. Wills and Administrations.**

Chaplin on Wills, with Page on Wills, for collat-  
eral reading.

**VII. Wills and Administrations — continued.**

Croswell on Executors and Administrators (1897).  
New York Code of Civil Procedure, §§ 1814–1870  
and 2472–2860.

New York Revised Statutes, Part II, ch. VI,  
title I.

(a) Art. 1, § 1 (as am. by L. 1867, ch. 782),  
2–5.

(b) Art. 2, § 21 (as am. by L. 1867, ch. 782),  
22.

(c) Art. 3, §§ 40–48, 49 (as am. by L. 1869,  
ch. 22), 50–53, 69–71.

New York Revised Statutes, Part II, ch. VII, title  
III, §§ 67–70.

**New York Laws.**

L. 1853, ch. 238, § 1 (as am. by L. 1879,  
ch. 316).

L. 1860, ch. 360, §§ 1 and 2.

L. 1865, ch. 368, § 6.

L. 1867, ch. 782, §§ 2, 5, 13 (as am. by L.  
1887, ch. 630), 14.

L. 1875, ch. 267, § 7.

L. 1875, ch. 343, § 5.

L. 1887, ch. 317, § 7.

**VIII. Equity Jurisdiction.**

Bispham on Equity (6th Ed.) or  
Eaton on Equity.

**IX. Special Contract Subjects.**

**1. Bailments and Carriers.**

Browne's, or Lawson's, or Hale's texts, with  
McClain's Cases on Carriers, and article II  
of the New York Railroad Law.

**2. Insurance.**

Richards on Insurance, with Woodruff's  
Cases on Insurance; and §§ 55, 57, 92,  
121, 211, 238, 266, of the New York In-  
surance Law.

**IX. Special Contract Subjects — continued.**

**3. Negotiable Instruments.**

Bigelow's Bills, Notes and Cheques (2d Ed.).

Huffcut's Negotiable Instruments.

**X. The Law of Association.**

**1. Partnership.**

Burdick on Partnership, with Burdick's Cases.

New York Partnership Law.

**2. Joint-Stock Companies.**

New York Joint Stock Association Law.

**3. Private Corporations.**

Taylor or Clark on Corporations, with Smith's or Keener's Cases on Corporations.

New York General Corporation Law.

New York Stock Corporation Law.

New York Business Corporation Law.

New York Code Civil Procedure, §§ 1775-1813, 3357-3397.

**4. Public Corporations.**

Dillon on Municipal Corporations, or Smith's Cases on Public Corporations.

**XI. Constitutional Law.**

Cooley's Principles of Constitutional Law, with McClain's Cases on Constitutional Law.

United States Constitution.

New York Constitution.

**B.**

**CIVIL PROCEDURE AND EVIDENCE.**

(*Note.*—The study of Procedure should begin at the same time as the study of the Substantive Law, and be continued throughout the whole period of study.)

**I. Civil Procedure.**

**i. Introductory.**

Bryant's Code Pleading.

**I. Civil Procedure — continued.**

**2. Courts.**

New York Constitution, art. VI.

New York Code Civil Procedure, §§ 1-103,  
190-198, 217-262, 340-361.

**3. Limitations.**

New York Code Civil Procedure, §§ 362-  
415.

**4. Commencement of Actions.**

New York Code Civil Procedure, §§ 416-  
477.

**5. Pleadings.**

New York Code Civil Procedure, §§ 478-  
546.

Bliss, Code Pleading.

**6. Interlocutory Proceedings.**

New York Code Civil Procedure, §§ 548-  
827.

**7. Trials.**

New York Code Civil Procedure, §§ 963-  
991, 1008-1026, 1163-1189.

**8. Judgments and the Enforcement Thereof.**

New York Code Civil Procedure, §§ 1200-  
1281, 1932-1941, 1362-1495, 2432-  
2471, 1871-1879.

**9. Special Provisions as to Property Actions.**

New York Code Civil Procedure, §§ 1496-  
1741.

**10. Foreclosure by Advertisement.**

New York Code Civil Procedure, §§ 2861-  
3158, 2231-2265.

**11. Actions in Justices' Courts.**

New York Code Civil Procedure, §§ 2861-  
3158, 2231-2265.

**I. Civil Procedure — continued.**

**12. State Writs.**

New York Code Civil Procedure, §§ 1991-2102.

**13. Vacating Judgments.**

New York Code Civil Procedure, §§ 1282-1292.

**14. Exceptions; Motion for New Trial.**

New York Code Civil Procedure, §§ 992-1007.

**15. Appeals.**

New York Code Civil Procedure, §§ 1293-1361.

**16. Certiorari.**

New York Code Civil Procedure, §§ 2120-2148.

**II. Evidence.**

Stephen's Digest (Chase's 2d ed.), or  
Greenleaf on Evidence, vol. 1 (Wigmore's ed.)  
Thayer's Cases on Evidence.

New York Code Civil Procedure, Index "Evidence."

# YALE UNIVERSITY.

NEW HAVEN, CONN.

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**A COURSE OF READING IN LAW WHICH THE FACULTY  
OF THE LAW DEPARTMENT OF YALE UNIVERSITY  
APPROVE AND WHICH IT IS ASSUMED WILL RE-  
QUIRE THE STUDENT'S CAREFUL ATTENTION DUR-  
ING A PERIOD OF AT LEAST THREE YEARS.**

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The exact order in which legal studies should be pursued is as respects some topics more or less arbitrary. As respects others it is a matter of no little importance, and one which cannot be disregarded, if the best results are to be attained. The matter is of much more importance to those studying alone in offices than to those who have the aid of instructors in the Law Schools.

The course of study which we have outlined is not in all respects that which is followed in the Yale Law School. A course prescribed for students in schools generally needs modification for those who cannot have the assistance which the schools afford.

The student may begin his legal study with **ROBINSON'S ELEMENTARY LAW**, which should be read in connection with **BLACKSTONE'S COMMENTARIES**, consulting at the same time such other works cited by Professor Robinson as the student has access to in the office in which he reads. He should read the Preface to the work on Elementary Law and carefully conform to its directions. The study of **CRIMINAL LAW** may next engage his attention, and **CLARK'S** or **MAY'S** work on this subject be read. This may be followed by **COOLEY** or **BIGELOW ON TORTS**.

He may then pass to the subject of **CONTRACTS**, and it is advised to read **HUFFCUT'S EDITION OF ANSON'S LAW OF**

**CONTRACT**, and follow it with **CLARK'S CONTRACTS**, **HUFFCUT'S AGENCY**, **LAWSON'S BAILMENTS**, and **SCHOULER'S DOMESTIC RELATIONS** may next be read in the order named.

Thereafter the law of **PROPERTY** may be taken up. The student is recommended first to read **DARLINGTON ON PERSONAL PROPERTY**, and then **TIEDEMAN ON REAL PROPERTY**.

By this time he ought to be in a position to understand the bearing of methods of **PROCEDURE** upon the development as well as the enforcement of common law rights, and we should advise his turning his attention to **ADJECTIVE LAW** so far as to acquaint himself with the main rules of pleading and evidence in civil actions. He should now carefully study the first volume of **GREENLEAF'S EVIDENCE**; then **HEARD'S CIVIL PLEADING**, following it with **BRYANT'S CODE PLEADING**.

The subject of **EQUITY** should next be taken up, and he may use first the work either of **BISPHAM**, **EATON** or **MERWIN**, and then **PATERBAUGH ON PLEADING AND PRACTICE IN EQUITY**.

This may be followed by a work on **NEGOTIABLE PAPER**. **BIGELOW ON BILLS AND NOTES**, or **NORTON ON BILLS AND NOTES** (3d Edition), or **HUFFCUT'S CASES ON NEGOTIABLE INSTRUMENTS** may be read.

In conclusion of these preliminary studies, the student is advised to read, in the order named: **LINDLEY** or **PARSONS ON PARTNERSHIP**; **MORAWETZ**, **TAYLOR**, or **ELLIOTT ON PRIVATE CORPORATIONS**; **COOLEY'S PRINCIPLES OF CONSTITUTIONAL LAW**; and **POMEROY ON REMEDIES AND REMEDIAL RIGHTS**.

# NEW YORK LAW SCHOOL.

NEW YORK CITY, N. Y.

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## CURRICULUM FOR LAW CLERKS, RECOMMENDED BY THE DEAN OF THE NEW YORK LAW SCHOOL.

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Elementary Law.....	Robinson.
Domestic Relations....	Dwight on Persons and Personal
Personal Property.....	Property.
Criminal Law.....	May (Beale's Edition) and Beale's Criminal Pleading and Practice.
Torts.....	Cooley.
Contracts .....	Clark.
Principal and Agent...	Huffcut.
Bailments .....	Lawson or Hale.
Sales .....	Tiffany.
Partnership.....	George.
Negotiable Paper ....	Norton.
Insurance .....	Richards.
Principal and Surety...	Baylies.
Equity Jurisprudence	Eaton, or Bispham.
Law of Corporations..	Elliott, or Clark.
Wills and Administra-	Schouler on Wills.
tions. ....	Croswell on Exrs. and Admrs.
Real Property .....	Tiedeman.
Pleading and Practice	N. Y. Code Civil Procedure.
Evidence .....	Greenleaf (1st volume), or Chase's Stephen's Digest of Evidence.
Constitutional Law ...	Cooley.
Legal Ethics .....,	Sharswood.

# UNIVERSITY OF PENNSYLVANIA.

PHILADELPHIA, PA.

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## SUGGESTED LIST OF WORKS TO BE STUDIED BY A MAN INTENDING TO STUDY LAW IN AN OFFICE, PRE- PARED BY THE DEAN OF THE DEPARTMENT OF LAW.

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Blackstone .....	Any recent standard edition.
Property .....	Gray's Cases on Property.
Real Property .....	{ Digby's History of the Law of Real Property.
	{ Williams on Real Property.
Contracts .....	{ Harriman on Contracts.
	{ Keener's Cases on Contracts.
Equity .....	{ Keener's Cases on Equity.
	{ Bispham's Equity.
Trusts .....	Ames's Cases on Trusts.
Evidence .....	{ Thayer's Cases on Evidence. { Greenleaf's Evidence, 1st volume.

In conclusion, we will say to those availing themselves of the above valuable work of the law faculties, who have been willing, without price and against interest, to aid in their law education, consider each course carefully, and having determined which is the best suited to your circumstances and surroundings, adopt it, stick to it and finish it. Do not imagine that you can do better work yourself or construct a better system. You cannot, and therefore should not try. The curse of the desultory reading of the majority of the law clerks is its want of method; the lack of an orderly arrangement of the subjects, all coördinating so that something read to-day by logical processes will lead up to that

which may come a year later. The learned gentlemen who constructed each of the courses made it a work perfect in itself, a finished structure from foundation to roof; the disturbance of a single item would destroy its usefulness, and the student who attempts to form from either a system to suit himself will lose the benefit of the logical and scientific method which is the underlying principle of each. The topics must be studied and the books read in the order in which they are placed. Do not change the arrangement nor substitute other books for those recommended. The books named were written, in many instances, by educators for law students, and are distinguishable as such from the ponderous encyclopedias and treatises written for the lawyer's use in court. It may be that you do not own the books suggested; if not, buy at least one of them on each topic; you cannot work without tools. You will acquire a law library some time. Why not begin with the volumes here recommended? Every dollar so spent will be advantageously invested, and its possible expenditure in ways not as beneficial nor as proper prevented.

We lay great stress upon the constant use of the books of "Select Cases" recommended to be read in connection with the text-books. They are invaluable and a constituent part of the courses. They contain all the leading cases, selected with judgment on the various topics treated, and illustrate the principles of the law by the opinions of its great masters, and on all the subjects bring to the student the best treasures of thousands of books entirely beyond his reach.

Professor Huffcut, of the faculty of the Cornell University College of Law, expresses so pithily how the books should be read that we will content ourselves on that necessary consideration, with a quotation from a letter which he wrote to us. He says: "In regard to the methods of reading, I would suggest that the student should use the text-books and case-books as a pair and not as a tandem. He will get better results by using the principles of the law in operation in the cases as fast as he learns them, than by attempting to learn all of the principles first and then studying the cases."

The courses are good for any State in the Union, for they purpose to teach the principles of the great science. The references to the New York statutes in the Cornell course are intended only for those reading for admission to the New York bar, but they are none the less of use to the students of other States whose task it will be to search the statutes of their own jurisdiction and find therein the corresponding law and study it accordingly.

It will take a clerk who studies diligently about three years of work, ten months to a year, four hours to a day, to finish any of the courses. Four hours a day of intense application to the study of the law is amply sufficient for the average law clerk and as much as he can assimilate, in view of his office work, with a maximum of good results. If he has additional time in which to read, he should broaden his mind and improve his style and diction by reading the masterpieces of English literature, not neglecting its poetry and drama; he should read books on the history and development of the law and on English and United States general, political and constitutional history; also Sharswood's Legal Ethics, a most valuable work.

The courses suggested are neither in extent nor variety as complex, nor do they cover as many subjects as the curriculum of any of the law schools named, and we indulge in the hope that the clerk will consider them carefully and be so impressed with the magnitude of the task before him that he will at once enter a law school and receive that education in the law which he can obtain nowhere else.

But while engaged in the cultivation of his intellect he must not be unmindful of the moral obligations which he will assume upon entering the profession, and should endeavor to fit himself to support honorably the highest traditions of the bar in its relations to the State, to the administration of justice, to his clients and to himself.

He should reflect upon the many responsibilities he may be called upon to assume, and fully determine never to do a dishonorable act nor a conscious wrong, and so to live that he will not give just occasion for reproach, either to himself or to his calling.

He should have high ideals and live up to them in a manly and sensible way, and endeavor to be a good citizen, as well as a good lawyer. We know that by the combination of talent in his profession and of good citizenship he will be able to reap some of the rewards of properly applied industry and at the same time to do his share toward maintaining the dignity and prestige of the ancient and honorable profession of the law.



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